



DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60-1, 60-2, 60-4, 60-20, 60-30, 60-40, 60-50, 60-300, and 60-741

RIN: 1250-AA14

Pre-enforcement Notice and Conciliation Procedures

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor publishes this final rule to modify procedures and standards the Office of Federal Contract Compliance Programs (“OFCCP” or “the agency”) uses when issuing pre-enforcement notices and securing compliance through conciliation. This final rule strengthens OFCCP’s enforcement by rescinding the evidentiary standards and definitions codified in 2020 (“the 2020 rule”), which hindered the agency’s ability to pursue meritorious cases. OFCCP is instituting a streamlined, effective, and flexible pre-enforcement and conciliation process that promotes greater consistency with Title VII of the Civil Rights Act of 1964 (“Title VII”).

DATES: These regulations are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Tina Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210. Telephone: (202) 693-0103 or toll free at 1-800-397-6251. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

I. Legal Authority

OFCCP administers and enforces Executive Order 11246, as amended (“E.O. 11246”); Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (“Section 503”); and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (“VEVRAA”), as well as their implementing regulations. Issued in 1965, and amended several times in the intervening years, E.O. 11246 has two principal purposes. First, it prohibits covered Federal contractors and subcontractors¹ from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, national origin, or because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.² Second, it requires covered contractors to take affirmative action to ensure equal employment opportunity.

The requirements in E.O. 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of \$10,000; (2) has Federal contracts or subcontracts that, when combined, total in excess of \$10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount. Supply and service contractors with 50 or more employees and a single Federal contract or subcontract of \$50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60-2. Construction contractors have different affirmative action requirements under E.O. 11246, codified at 41 CFR part 60-4.

Enacted in 1973 and amended since, the purpose of Section 503 is twofold. First, Section 503 prohibits employment discrimination on the basis of disability by Federal contractors. Second, it requires each covered Federal contractor to take affirmative action to employ and

¹ Hereinafter, the terms “contractor” or “Federal contractor” are used to refer collectively to Federal contractors and subcontractors that fall under OFCCP’s authority, unless otherwise expressly stated. This approach is consistent with OFCCP’s regulations, which define “contract” to include subcontracts and “contractor” to include subcontractors.

² The nondiscrimination protections and standards under E.O. 11246 are interpreted consistently with those under Title VII of the Civil Rights Act of 1964 (“Title VII”). See *OFCCP v. Greenwood Mills, Inc.*, Nos. 00-044, 01-089, 2002 WL 31932547, at *4 (ARB Final Decision & Order Dec. 20, 2002) (“The legal standards developed under Title VII of the Civil Rights Act of 1964 apply to cases brought under [E.O. 11246].”).

advance in employment qualified individuals with disabilities. The requirements in Section 503 generally apply to any business or organization that holds a single Federal contract or subcontract in excess of \$15,000.³ Pursuant to Section 503, contractors with 50 or more employees and a single Federal contract or subcontract of \$50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60-741, subpart C.

Enacted in 1974 and amended in the intervening years, VEVRAA prohibits Federal contractors from discriminating against employees and applicants because of their status as protected veterans (defined by the statute to include disabled veterans, recently separated veterans, Armed Forces Service Medal Veterans, and active duty wartime or campaign badge veterans). It also requires each covered contractor to take affirmative action to employ and advance in employment these veterans. The requirements in VEVRAA generally apply to any business or organization that holds a single Federal contract or subcontract in excess of \$150,000.⁴ Pursuant to VEVRAA, contractors with 50 or more employees and a single Federal contract or subcontract of \$150,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60-300, subpart C.

Pursuant to these authorities, receiving a Federal contract comes with a number of responsibilities. Contractors are required to comply with all provisions of these authorities as well as the rules, regulations, and relevant orders of the Secretary of Labor. Where OFCCP finds noncompliance under any of the three authorities or their implementing regulations, it utilizes established procedures to either facilitate resolution or proceed to administrative enforcement as necessary to secure compliance. A contractor found in violation that fails to correct violations of OFCCP's regulations may, after the opportunity for a hearing, have its contracts canceled, terminated, or suspended and/or may be subject to debarment.

³ Effective October 1, 2010, the coverage threshold under Section 503 increased from \$10,000 to \$15,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds*, 75 FR 53129 (Aug. 30, 2010).

⁴ Effective October 1, 2015, the coverage threshold under VEVRAA increased from \$100,000 to \$150,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds*, 80 FR 38293 (July 2, 2015).

II. Summary of Relevant Background

This final rule, like the 2020 rule it modifies, focuses almost entirely on OFCCP's pre-enforcement resolution procedures. This includes the processes by which the agency notifies Federal contractors of the agency's findings during the compliance evaluations it conducts, and how the agency seeks to conciliate matters in which it finds a violation of its regulations prior to referring a matter to the Office of the Solicitor for possible enforcement. To provide background and context for this final rule, we first summarize how OFCCP had traditionally accomplished this prior to the 2020 rule, the changes that the 2020 rule made to this approach, and how the agency proposed to modify this approach in the 2022 Notice of Proposed Rulemaking (NPRM).

A. OFCCP's Use of Pre-Enforcement Notices Prior to the 2020 Rule

For decades prior to the promulgation of the 2020 rule, the regulations most relevant to OFCCP's pre-enforcement resolution procedures remained unchanged.⁵ OFCCP's general regulations on compliance evaluations provided that, when OFCCP finds deficiencies in contractors' compliance with its regulatory obligations, it will make "reasonable efforts...to secure compliance through conciliation and persuasion...."⁶ If the compliance evaluation found a material violation of the legal authorities administered by the agency, the contractor was willing to correct the violations, and OFCCP determined that settlement was appropriate, the parties would enter into a written conciliation agreement.⁷ If the agency had reasonable cause to believe that the contractor violated OFCCP's authorities and the contractor would not correct the violation, the agency could issue a notice requiring the contractor to show cause ("Show Cause Notice"), within 30 days, why enforcement proceedings or other appropriate actions should not

⁵ These regulations were not substantively revised by the 2020 rule, and this final rule makes only minor clarifying revisions to one of the provisions, as discussed in more detail below.

⁶ 41 CFR 60-1.20(b); 60-300.60(b); 60-741.60(b).

⁷ 41 CFR 60-1.33; 60-300.62; 60-741.62 (2019). While the 2020 rule added additional provisions to these sections of the regulations, the language on conciliation agreements remained substantively the same.

be instituted.⁸ For decades, OFCCP evaluated and conciliated with contractors under this regulatory framework.

In addition to these regulatory provisions, OFCCP, as a matter of agency policy, long provided contractors with additional notice of its findings and an opportunity to respond during the course of its compliance evaluations and prior to any referral for enforcement.⁹ Specifically, whenever discrimination or other violations were found during the course of a compliance review, prior to the issuance of a Show Cause Notice, OFCCP would issue to the contractor a Notice of Violation.¹⁰ The Notice of Violation would notify the contractor that the agency found violations of the legal authorities it administers, and would specify the corrective actions the contractor would have to take in order to resolve the violations.¹¹ OFCCP required that the Notice of Violation indicate the reasons for each finding and, if appropriate, note the contractor's failure to adequately justify its actions.¹² Contractors were provided an opportunity to respond to the Notice of Violation and to attempt to conciliate the violations prior to issuance of a Show Cause Notice.¹³

Additionally, prior to the issuance of a Notice of Violation, OFCCP would in certain circumstances issue a Predetermination Notice. The 2020 rule traced the agency's use of the Predetermination Notice back to 1988.¹⁴ Since that time, the agency has used the Predetermination Notice in a variety of circumstances. In those situations in which it was used, the purpose of this pre-enforcement notice has been to convey to the contractor an analysis of concerns OFCCP identified during its review indicating potential discrimination, whether

⁸ 41 CFR 60-1.28; 60-300.64; 60-741.64 (2019); *Compliance Responsibility for Equal Employment Opportunity*, 43 FR 49240, 49247 (Oct. 20, 1978); *Revision of Chapter*, 33 FR 7804, 7810 (May 28, 1968). These regulations were not modified by the 2020 rule.

⁹ See generally Federal Contract Compliance Manual (FCCM), Chapter 8, Resolution of Noncompliance, available at <https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-8-resolution-noncompliance> (last accessed Dec. 1, 2022)

¹⁰ *Id.* at Chapter 8F, Notice of Violation, available at <https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-8-resolution-noncompliance/8f-notice-violation> (last accessed Dec. 1, 2022).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ "Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination," 85 FR 71553, 71561 (Nov. 10, 2020).

referred to as “preliminary findings” or “preliminary indicators.” Historically, issuance of a Predetermination Notice was not required. In 2018, however, OFCCP issued a Directive on the use of Predetermination Notices, requiring that OFCCP issue them “for preliminary individual and systemic discrimination findings identified during the course of compliance evaluations,” and providing contractors with an opportunity to respond prior to OFCCP deciding to issue a Notice of Violation.¹⁵ This Directive remains in effect.

B. The 2020 Rule

In November 2020, OFCCP published a final rule amending its regulations regarding the agency’s pre-enforcement resolution procedures.¹⁶ The 2020 rule changed the obligations placed on the agency in several respects. First, the 2020 rule codified¹⁷ that OFCCP would issue a Predetermination Notice and Notice of Violation in any compliance evaluation¹⁸ in which the agency found potential discrimination or other material violations of its legal authorities.¹⁹ Accordingly, in combination with the Show Cause Notice already required by the regulations, the 2020 rule required OFCCP to provide the contractor with three separate pre-enforcement notices during the course of its compliance evaluation, and an opportunity for contractors to respond to each,²⁰ prior to a decision to refer a case to the Office of the Solicitor for possible enforcement.

In addition, the 2020 rule established specific evidentiary requirements that OFCCP would need to meet in order to issue pre-enforcement notices. These requirements applied

¹⁵ Directive 2018-01, Use of Predetermination Notices, (Feb. 27, 2018), available at <https://www.dol.gov/agencies/ofccp/directives/2018-01> (last accessed Dec. 1, 2022).

¹⁶ 85 FR 71553.

¹⁷ As noted above, Directive 2018-01 required that OFCCP issue Predetermination Notices for preliminary individual and systemic discrimination findings identified during the course of compliance evaluations. The 2020 rule codified this practice. *See* 85 FR 71561.

¹⁸ The regulation stated that OFCCP “may” issue these notices, *see* 41 CFR 60-1.33(a) and (b) (2021), but this language was to account for OFCCP’s inherent enforcement discretion not to pursue enforcement in certain cases if it so chose. *See generally Heckler v. Chaney*, 470 U.S. 821 (1985). For any matters that OFCCP wished to pursue with potential discrimination or other material violations, the 2020 rule required the issuance of the Predetermination Notice and Notice of Violation.

¹⁹ 85 FR 71553. The final rule, which took effect on December 10, 2020, was published after OFCCP considered comments it received on a notice of proposed rulemaking, *Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination*, 84 FR 71875 (Dec. 30, 2019).

²⁰ *See* 41 CFR 60-1.33; 41 CFR 60-300.62; 41 CFR 60-741.62 (providing the contractor an opportunity to respond to the Predetermination Notice, Notice of Violation, and Show Cause Notice).

equally to the Predetermination Notice and the Notice of Violation. First, the rule required OFCCP to identify and disclose to contractors in the Predetermination Notice and Notice of Violation the theory of discrimination — disparate treatment and/or disparate impact — under which it was proceeding. Second, depending on the theory of discrimination, the 2020 rule required OFCCP to meet specific evidentiary thresholds in order to issue any pre-enforcement notice. For matters proceeding under a disparate treatment theory, the 2020 rule required OFCCP to set forth: (1) sufficient “quantitative evidence”; (2) sufficient “qualitative evidence” that, in combination with other evidence, supported a finding that the contractor’s discriminatory intent caused disparate treatment; and (3) a demonstration that any observed disparities were also “practically significant.”²¹ For matters proceeding under a disparate impact theory, the 2020 rule required the same findings of sufficient “quantitative evidence” and “practical significance” prior to issuing a pre-enforcement notice, as well as a requirement that OFCCP identify the specific policy or practice of the contractor causing the adverse impact. For purposes of further describing the evidentiary obligations OFCCP must meet to issue these pre-enforcement notices, the 2020 rule also included lengthy definitions of “quantitative evidence” and “qualitative evidence” detailing specific types and amounts of evidence that would satisfy the definition.

Additionally, the 2020 rule required OFCCP to disclose the quantitative and qualitative evidence it had accumulated in “sufficient detail” to allow contractors to investigate and respond. It also required OFCCP to disclose “the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis.” Once OFCCP issued the Predetermination Notice, the 2020 rule provided contractors with 30 days to respond. As an alternative, the 2020 rule also codified a provision stating that contractors could waive the procedures for issuing a Predetermination Notice and/or Notice of

²¹ The 2020 rule included some narrow exceptions where OFCCP would not be required to satisfy all three of these prongs in order to issue a Predetermination Notice, such as when qualitative evidence alone could satisfy a disparate treatment finding, or if the quantitative evidence was “so extraordinarily compelling that by itself it is sufficient” to support a disparate treatment finding. 41 CFR 60-1.33(a)(2). As discussed in the NPRM and herein, however, Title VII does not require meeting such rigid requirements in order to satisfy a *prima facie* case; rather, case law provides that the standards of proof in such cases are flexible and fact-specific.

Violation and enter directly into a conciliation agreement if they so chose. Finally, the 2020 rule included severability clauses that applied only to these new pre-enforcement obligations.

The stated rationale for these revisions in the 2020 rule was “to increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP resolution procedures, and enhance the efficient enforcement of equal employment opportunity laws.”²² The 2020 rule preamble further asserted that the rule would “provide[] contractors with more certainty as to OFCCP’s operative standards for compliance evaluations, and provide[] guardrails on the agency’s issuance of pre-enforcement notices.”²³ As a result, OFCCP concluded that the 2020 rule would “help [the agency] to increase the number of contractors that the agency evaluates and focus on resolving stronger cases through the strategic allocation of limited agency resources.”²⁴ The 2020 rule further clarified that the Department was issuing the rule “as an exercise of its enforcement discretion,” and that the approach codified in the rule was “neither compelled nor prohibited by Title VII and OFCCP case law.”²⁵

C. The 2022 NPRM

On March 22, 2022, OFCCP published a NPRM that proposed to rescind most, though not all, provisions in the 2020 rule.²⁶ OFCCP proposed to retain the requirement that it would issue Predetermination Notices and Notices of Violation to contractors in matters in which OFCCP found preliminary indicators of discrimination. OFCCP also proposed to retain the regulatory language regarding early resolution, which provides that contractors may waive the pre-enforcement notice procedures if they enter directly into a conciliation agreement.

OFCCP proposed to remove or modify the other provisions in the 2020 rule. OFCCP proposed to eliminate the specific evidentiary requirements of 41 CFR 60-1.33(a) and (b) that the agency needed to meet to issue a Predetermination Notice or Notice of Violation. This included

²² 85 FR 71553.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* As noted above, the nondiscrimination protections and standards under E.O. 11246 are interpreted consistently with those under Title VII.

²⁶ See *Pre-Enforcement Notice and Conciliation Procedures*, 87 FR 16138 (Mar. 22, 2022).

the requirement to identify the theory of discrimination at the pre-enforcement notice stage, the requirement to provide specific and different forms of “quantitative” and “qualitative” evidence as defined by the 2020 rule, the definitions of “quantitative” and “qualitative” evidence, and the requirement to demonstrate that any disparities identified were also “practically significant.”

The NPRM provided multiple reasons for these proposed modifications.²⁷ First and foremost, the NPRM explained that many of the key stated objectives of the 2020 rule — to promote more effective enforcement, increase the number of contractors that the agency evaluates, and promote greater certainty and clarity regarding the agency’s resolution procedures — had not been met. Rather than creating clear standards and more effective enforcement, the NPRM noted that the 2020 rule instead resulted in time-consuming disputes with contractors over the application of the new requirements. The NPRM also described how the 2020 rule placed certain obligations on OFCCP that went beyond, or were even in some cases inconsistent with, Title VII principles and case law. For instance, the 2020 rule required OFCCP to demonstrate practical significance, a concept that is not found in the Title VII statute and that multiple circuit courts have held is not necessary in order to satisfy a *prima facie* case of employment discrimination. The 2020 rule also included rigid evidentiary thresholds for issuing pre-enforcement notices, such as requiring specific types and amounts of “quantitative evidence” and “qualitative evidence” as defined by the rule with only narrow exceptions, which the NPRM explained were inconsistent with the general principle that the Title VII evidentiary standard is a flexible one dependent on the unique facts at issue in each case. The NPRM further emphasized that, beyond the rigid evidentiary requirements themselves, the 2020 rule’s requirement that OFCCP meet them prior to issuing pre-enforcement notices, while the investigation is still underway, had also proven problematic. Not only did this require OFCCP to meet a heightened evidentiary threshold before issuing even a *preliminary* notice of findings to contractors, but the

²⁷ The reasons summarized here are some of the key points raised in the NPRM but is not an exhaustive list. For further detail and explanation, we refer readers to the NPRM itself, as well as the response to public comments in Section IV, *infra*.

same standard applied to both the Predetermination Notice and the Notice of Violation, rendering the two notices — which were originally intended to serve separate purposes — duplicative. Accordingly, the NPRM proposed to restore the function of the Predetermination Notice to convey *preliminary* findings of potential discrimination, providing contractors early notice when OFCCP had found potential issues and fostering more efficient exchanges of information that may focus the scope of review.

OFCCP also proposed to modify the period of time for contractors to respond to pre-enforcement notices from 30 to 15 days, noting that the latter was the timeframe for response that the agency had set forth in its 2018 Directive on Predetermination Notices and that it would continue its practice of providing extensions to contractors for good cause when needed.²⁸ Additionally, OFCCP proposed to modify the severability clause included in the 2020 rule, expanding it so that it applied to all parts of OFCCP’s regulations, not just the specific section pertaining to OFCCP’s resolution procedures.

Finally, OFCCP proposed two additional clarifications to the regulations related to, but not addressed by, the 2020 rule. First, OFCCP proposed language clarifying the “reasonable efforts” standard, which applies to the actions the agency must take “to secure compliance through conciliation and persuasion.” The NPRM proposed language clarifying that the standard should be interpreted consistently with Title VII and its requirement that the Equal Employment Opportunity Commission (EEOC) “endeavor to eliminate any such alleged employment practice by informal methods of conference, conciliation, and persuasion” prior to bringing an enforcement action, to ensure that OFCCP has the same flexibility in the administration of its laws as that recognized under Title VII by Congress and by the U.S. Supreme Court. Second, the NPRM clarified that, if OFCCP identified additional violations after issuing a Predetermination Notice, it could include those violations in a subsequent Notice of Violation or Show Cause

²⁸ See Directive 2018-01, Use of Predetermination Notices, (Feb. 27, 2018), available at <https://www.dol.gov/agencies/ofccp/directives/2018-01> (last accessed Dec. 1, 2022).

Notice without amending and reissuing the Predetermination Notice. The NPRM explicitly stated that OFCCP would continue to provide contractors with an opportunity to respond to and conciliate any such violations prior to referring a case for enforcement.

D. Public Comments

OFCCP received 11 public comments in response to the NPRM. The commenters included individuals, employer associations, law firms, a women's rights legal advocacy organization, a labor rights organization, and a civil and human rights advocacy organization. Some commenters, such as the women's rights legal advocacy organization, labor rights organization, and civil and human rights advocacy organization, generally supported the proposed rule, asserting that the 2020 rule imposed unnecessary, burdensome, and confusing enforcement standards that did not align with the requirements of Title VII and conflated the first two stages of OFCCP's pre-enforcement process, thereby causing delay and wasting resources. These commenters believed that modifying the 2020 rule would restore consistency between OFCCP practice and Title VII and would reestablish the distinct roles of the Predetermination Notice and the Notice of Violation. Other commenters, such as employer associations and law firms, generally opposed the proposal, expressing concerns that the modification would remove transparency from the enforcement process, did not align with Title VII, and would afford contractors less due process. These commenters also asserted that OFCCP has not demonstrated a need for the rulemaking and believed that 15 calendar days was an inadequate amount of time to provide a response to a Predetermination Notice. In addition, one commenter raised concerns that the proposed use of the term "indicator of discrimination" signaled that OFCCP intended to issue Predetermination Notices based solely on the results of the agency's initial analyses. These comments are explained in more detail and addressed by the agency in Section IV, below.

III. Summary of the Final Rule

After consideration of all significant issues raised in the public comments, this final rule adopts most of the revisions outlined in the NPRM, with some minor adjustments. As set forth in

more detail below, the changes adopted in this final rule stem from OFCCP's experience implementing the 2020 rule as well as its reconsidered policy judgment as to how OFCCP can strengthen enforcement of its requirements and promote consistency with Title VII principles. In sum, this final rule largely returns to the processes and standards under which OFCCP and contractors operated for many years prior to the effective date of the 2020 rule, while also providing additional certainty and notice to contractors.

As proposed in the NPRM, this final rule does retain some provisions from the 2020 rule that will provide additional certainty and efficiency for contractors during the course of compliance evaluations. First, the final rule retains the requirement that OFCCP will issue a Predetermination Notice and Notice of Violation to contractors in all matters in which the agency has made preliminary findings of potential discrimination and findings of discrimination, respectively. Second, the final rule retains the early resolution provisions allowing OFCCP and the contractor to resolve identified issues without the need for OFCCP to issue a Predetermination Notice and Notice of Violation if the contractor so chooses.

The final rule does include a few additional changes from what was proposed. First, the final rule replaces the term "indicators of discrimination" with "preliminary findings of potential discrimination" to describe what is necessary in order to issue a Predetermination Notice. Further detail regarding this change is set forth in Section IV, *infra*. Second, consistent with OFCCP's longstanding practice and the 2020 rule, the final rule includes a clarification that the agency may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review, or refuses to provide access to witnesses, records, or other information. Finally, the proposed language in the regulation on Predetermination Notices stated that if there was insufficient rebuttal evidence to the Predetermination Notice, the agency would "proceed with its review." The final rule makes two minor clarifications. It first adds language to clarify that OFCCP's determination on whether there was sufficient rebuttal evidence would be determined by the

contractor’s response and any additional investigation undertaken by the agency, to clarify that the agency may conduct an additional investigation after issuing the Predetermination Notice and as a result of the contractor’s response to the Predetermination Notice. It also amends this provision to clarify that it will proceed “to issue a Notice of Violation,” which is the intended, more specific meaning.

The final rule otherwise adopts the NPRM as proposed. A more detailed discussion of the public comments that OFCCP received follows in the next section.

IV. Response to Public Comments

A. Public Comments on Modifications to the E.O. 11246 Regulations

1. Evidentiary Standards

a. Qualitative and Quantitative Evidence

As described above, the NPRM proposed to amend § 60-1.3 by removing the 2020 rule’s definitions for “qualitative evidence” and “quantitative evidence.” OFCCP also proposed rescinding the requirement for the agency to provide both “qualitative” and “quantitative” evidence under a specific theory of proof before issuing a Predetermination Notice or Notice of Violation.

OFCCP received eight comments on this topic from employer associations, law firms, and labor rights and advocacy organizations. A women’s rights legal advocacy organization agreed with removing the definitions. It stated that the definitions were confusing and further disagreed with the 2020 rule’s requirement that OFCCP provide both quantitative and qualitative evidence before issuing Predetermination Notices or Notices of Violation. It asserted that removing this requirement will ensure that OFCCP can conduct investigations efficiently, “without being forced to develop its full slate of evidence at a preliminary stage.” A labor rights organization and a civil and human rights advocacy organization made similar comments, describing how the definitions and requirements for showing qualitative and quantitative evidence departed from Title VII principles and hindered OFCCP’s ability to issue pre-

enforcement notices based on the specific facts and circumstances uncovered through the compliance evaluation. One law firm stated that it understood why OFCCP would want to remove the qualitative and quantitative evidence definitions, as OFCCP should be able to evolve with Title VII's interpretation.²⁹ Some employer associations and law firms opposed removing the definitions and evidentiary requirements, asserting that the 2020 rule's definitions were broad enough to allow OFCCP to effectively pursue cases and stating that OFCCP was not required to provide examples of every type of quantitative or qualitative evidence included in the definitions.

OFCCP considered these comments and maintains that, on balance, the inclusion of the definitions created more problems than benefits. First and foremost, as set forth in the NPRM and expanded upon here, OFCCP found that these definitions created confusion and increased disputes regarding the evidence required to issue pre-enforcement notices. Specifically, since the 2020 rule went into effect, some contractors have asserted that OFCCP must present evidence in its preliminary pre-enforcement notices of the highly specific examples included in the definitions in order for the agency to satisfy the requirements of the 2020 rule. In one instance, rather than providing a substantive response to the agency's preliminary determination notice, the contractor cited the 2020 rule, claiming that OFCCP failed to identify sufficient qualitative evidence of intentional discrimination. The contractor disputed the type of qualitative evidence OFCCP was permitted to use under the 2020 rule, asserting that information OFCCP obtained from interviews was not evidence, but instead speculative statements insufficient to infer discriminatory intent. These disputes are directly at odds with the 2020 rule's stated intention of increasing clarity and enhancing the efficient enforcement of equal employment opportunity laws.

In addition to these inefficiencies, OFCCP, upon further reconsideration, found that the codification of evidentiary definitions was confusing, overly particularized, and inconsistent with the general principle that the Title VII evidentiary standard is a flexible one dependent on the

²⁹ This firm disagreed with removing other aspects of the evidentiary requirements, which OFCCP addresses below.

unique facts at issue. As otherwise discussed in the NPRM, the definitions in the 2020 rule included many examples of evidence demonstrating overt bias, including “biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation.”³⁰ This type of highly specific evidence of discrimination is rare and not required by Title VII standards in order for a plaintiff to prevail.³¹ Yet, the inclusion of this language engendered contractor disputes over whether the evidence OFCCP presented met this definition. In addition, the definition did not encompass the full range of relevant evidence and ran counter to the flexibility needed to demonstrate discrimination based on the facts of each case. Further, although the “qualitative evidence” definition also applied to disparate impact matters, the definition was overly focused on evidence of discriminatory intent in disparate treatment cases. Although the definition included one example related to disparate impact cases—evidence related to “the business necessity (or lack thereof) of a challenged policy or practice”³²—that example was problematic because it was: (1) a category of evidence that is the employer’s burden to demonstrate, after the agency establishes a *prima facie* case;³³ and (2) not the only sort of “qualitative” evidence that plaintiffs typically introduce or rely upon in the course of a disparate impact case.³⁴ Another problem with the definition is that it included “whether the contractor has otherwise complied with its non-discrimination obligations” as a type of permissible qualitative evidence. Upon reconsideration,

³⁰ 85 FR 71553, 71570-71574.

³¹ See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n.12 (1st Cir. 1999) (citing *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 171 n. 13 (1st Cir. 1998)) (noting that direct evidence, while probative of discrimination, is “rarely found in today’s sophisticated employment world”).

³² 85 FR 71557.

³³ 42 U.S.C. 2000e-2(k)(1)(A)(i); see also *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (“An employer may defend against liability [for disparate impact discrimination] by demonstrating that the practice is ‘job related for the position in question and consistent with business necessity.’” (quoting 42 U.S.C. 2000e-2(k)(1)(A)(i))); *Wards Cove Packing Co.*, 490 U.S. at 659 (“[T]he employer carries the burden of producing evidence of a business justification for his employment practice.”).

³⁴ By way of example, because a plaintiff in disparate impact cases must, where possible, identify the particular employment practice that is causing the adverse impact, see 42 U.S.C. 2000e-2(k)(1)(B)(i), it is commonplace for a plaintiff to introduce testimony or interview statements from expert witnesses or company officials regarding its selection or compensation system that would provide necessary context and help to identify the particular employment practice at issue. Similarly, evidence regarding less discriminatory alternative employment practices is a common feature in disparate impact cases. 42 U.S.C. 2000e-2(k)(1)(A)(ii).

OFCCP determined that this provision could easily be misinterpreted to mean that when a contractor complies with some of its nondiscrimination obligations, it somehow lessens the weight of evidence of noncompliance with other nondiscrimination obligations.

Some commenters, including law firms and employer associations, also asserted that the requirement to show quantitative and qualitative evidence helped contractors better understand the preliminary indicators and helped them provide a meaningful response to the Predetermination Notice. One employer association expressed the importance of the 2020 rule's requirement that OFCCP identify its theory of proof (*i.e.*, disparate treatment or disparate impact) and the benefit of the clear parameters the 2020 rule provided for each theory. In response to these comments, OFCCP notes that the agency will continue to provide a Predetermination Notice describing its preliminary findings of potential discrimination and any other potential violations. This information enables the parties to clarify the issues, respond to each other's positions, and work toward an efficient resolution. For proof at trial, the agency will marshal all relevant evidence to prove that discrimination has occurred, which will typically include interviews with a more expansive number of employees and other witnesses and documents, data, and other information obtained through the investigative and discovery process. However, the agency need not provide the specific theory of proof or satisfy rigid evidentiary standards to provide preliminary notice of findings of discrimination.³⁵ Furthermore, Title VII case law demonstrates that there are multiple ways to establish a *prima facie* case of discrimination as long as the plaintiff ultimately satisfies its burden of proof. As the U.S. Supreme Court and lower courts have long recognized, Title VII requires a case-by-case evaluation of the facts and circumstances.³⁶ Additionally, prior to discovery in litigation, OFCCP

³⁵ Longstanding case law provides that OFCCP need not make an election between alternative theories of proof during litigation, let alone in the preliminary notice stage of a compliance review. *OFCCP v. Honeywell*, 77-OFC-3, 1993 WL 1506966, at *11 (Sec'y of Labor June 2, 1993) ("no procedural election between alternative legal theories is required of a claimant at either pre-trial, or appellate stages") (citing *Wright v. Nat'l Archives & Records Serv.*, 609 F.2d 702, 711 (4th Cir. 1979)); see also *Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977).

³⁶ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (noting that the Supreme Court has "not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a

may not have access to the full evidentiary record necessary to evaluate the precise theories of proof and would need to conduct depositions of witnesses and obtain relevant data and information for each stage of the employment process at issue before making this determination. Despite this, the 2020 rule required OFCCP to satisfy bright line statistical thresholds and proffer specific types of evidence to issue even preliminary notices of findings to contractors. Additionally, OFCCP agrees with the law firm comment that the removal of the qualitative and quantitative evidence definitions will enable the agency's enforcement to evolve with developments in the interpretation of Title VII.

Based upon further consideration of its position, the effect of the final rule, and the comments received, OFCCP has determined the 2020 rule's rigid requirements were unnecessary, fostered confusion, and limited OFCCP's ability to pursue potentially meritorious cases. As noted above, the 2020 rule's evidentiary standards placed certain obligations on OFCCP that went beyond, or were even in some cases inconsistent with, Title VII principles and case law. Accordingly, OFCCP is removing the definitions for qualitative evidence and quantitative evidence and is rescinding the requirement for OFCCP to provide both quantitative and qualitative evidence under a specific theory of discrimination in order to issue a Predetermination Notice or Notice of Violation.

The NPRM also proposed removing the 2020 rule requirement that OFCCP disclose the quantitative and qualitative evidence the agency relied upon in the Predetermination Notice "in sufficient detail to allow contractors to investigate allegations and meaningfully respond."³⁷ The requirement for OFCCP to provide "sufficient detail" for a contractor to "meaningfully respond" is inherently subjective. Some contractors argued that the anecdotal evidence that OFCCP shared

prima facie case in the complex area of employment discrimination"); *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 551 (9th Cir. 1982) ("It would be improper to posit a quantitative threshold above which statistical evidence of disparate racial impact is sufficient as a matter of law to infer discriminatory intent, and below which it is insufficient as a matter of law."); *see also Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010) (also noting, in an individual case without statistical evidence, that "[t]he methods of presenting a prima facie case are flexible and depend on the particular situation.").

³⁷ 87 FR 16138, 16143.

to support its issuance of pre-enforcement notices failed to meet the qualitative evidence definition included in the 2020 rule. Contractors have also argued that the qualitative evidence that OFCCP provided was insufficient because the agency failed to disclose the identity of the interviewees who provided relevant statements at the Predetermination Notice stage.

Additionally, commenters, including a women's rights legal advocacy organization, a labor rights organization, and a civil and human rights advocacy organization, shared OFCCP's concern articulated in the proposed rule that the requirement to disclose anecdotal evidence at this preliminary stage may have a chilling effect on the willingness of victims and witnesses to participate in OFCCP's investigation due to concerns that an employer may uncover their identities, which could lead to retaliation. One commenter disagreed, citing OFCCP's ability to protect a witness' identity while still providing the required evidence. However, as described above, some contractors have nevertheless asserted that, under the 2020 rule, OFCCP must reveal the identity of relevant witnesses at the preliminary stage in order to meet the 2020 rule's requirements. OFCCP believes this interpretation of the regulation is incorrect, as the government informer's privilege generally protects the agency's right to withhold the identity of confidential witnesses.

Nevertheless, it remains that the 2020 rule's required disclosure of anecdotal evidence has led to extensive disputes about what information is sufficient under the rule, and OFCCP's authority to protect witness' confidentiality at the preliminary stages of investigations. These disputes over inherently subjective thresholds regarding what information needed to be proffered in preliminary notices of findings have limited OFCCP's ability to pursue cases that would be actionable under Title VII standards. Accordingly, in the final rule, OFCCP is rescinding the requirement to disclose the quantitative and qualitative evidence relied upon in the Predetermination Notice.³⁸ To promote consistency and notice to contractors, the final rule does

³⁸ OFCCP retains discretion to disclose some or all of the quantitative and qualitative evidence supporting the Predetermination Notice, where appropriate.

require the use of the Predetermination Notice where the agency has made preliminary findings of potential discrimination. Further, the final rule specifies that in the Predetermination Notice, OFCCP will continue to describe the preliminary findings of potential discrimination and any other potential violations to enable the contractor to understand OFCCP's position and provide a substantive response.

b. Statistical Model and Variables

While most comments opposing the rule focused on evidentiary standards as a whole, one law firm specifically requested that OFCCP retain the 2020 rule's requirement that, upon the contractor's request, OFCCP must provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. The law firm asserted that sharing this information promoted transparency and helped contractors understand OFCCP's analysis and allowed the contractor to more easily make a business decision to resolve the matter.

In response, OFCCP declines to retain this requirement because imposing a regulation requiring the production of the model and variables used in any statistical analysis the agency performs and an explanation for why any variable proposed by the contractor was excluded from that analysis creates inefficiencies. The agency already has guidance that promotes sufficient transparency through the sharing of information by OFCCP, including information on the agency's econometric methods and the provision of replication data.³⁹ OFCCP will continue to explain its statistical analysis in sufficient detail for the contractor to replicate the analysis and assess the merits of the agency's findings. OFCCP will also continue to explain its rationale for excluding otherwise reasonable variables from its analysis.

However, OFCCP has determined that imposing a regulatory requirement to provide the model and variables used in any statistical analysis, particularly at preliminary stages of the

³⁹ See Directive 2018-05, *Analysis of Contractor Compensation Practices During a Compliance Evaluation*, issued Aug. 24, 2018, available at <https://www.dol.gov/agencies/ofccp/directives/2018-05> (last accessed Dec. 5, 2022)

review, limits the agency's effective enforcement of the law. First, the 2020 rule's requirement for OFCCP to share its "model" is vague and subject to dispute, as the types of analyses and statistical techniques can vary widely from case to case, and the agency needs to exercise discretion over the aspects of its modeling that would be appropriate to share based on the stage of the investigation, the nature of the concerns identified, and a consideration of aspects of the analysis, tools, and techniques subject to deliberative process privilege.

The regulatory requirement to explain "any" variables suggested by the contractor raises similar concerns by limiting OFCCP's ability to exercise its enforcement discretion and promote efficiency in its investigation. Not all variables suggested by a contractor merit explanation and response. For example, variables that are highly correlated with other variables, those that do not impact selections or pay in the direction or magnitude claimed by the contractor, and those that are differentially distributed by gender or race but do not legitimately influence selection or pay may not warrant an explanation depending on the fact and circumstances of the matter. While OFCCP will address certain variables in appropriate circumstances, the categorical requirement that OFCCP address all proposed variables is inefficient.

In sum, rather than expend resources responding to unproductive requests for further information, OFCCP has determined that to promote effective enforcement, the agency needs to have discretion to ascertain where providing further details about its modeling is likely to be productive. Removing the regulatory requirements that OFCCP produce its models and variables and address all variables suggested by a contractor will allow OFCCP to utilize its discretion to provide information on its modeling and variables to promote contractors' understanding of concerns OFCCP has identified and to facilitate a prompt and successful resolution of compliance evaluations.

c. Practical Significance

In the NPRM, OFCCP proposed removing the regulatory requirement to demonstrate practical significance before issuing a Predetermination Notice.⁴⁰ The agency received five comments on the proposal to remove this regulatory requirement from employer associations, a law firm, a women's rights legal advocacy organization, and a civil and human rights advocacy organization. Two commenters supported removing the requirement, stating that whether Title VII requires a showing of practical significance is unsettled as a matter of law. One employer association commented that practical significance is a necessary consideration in scientific research and therefore cannot be ignored by the agency. The same commenter also believed that the use of practical significance allowed OFCCP to prioritize compliance evaluations with the strongest evidence and strategically allocate resources. Another employer association argued that removing the requirement to demonstrate practical significance before issuing a Predetermination Notice was generally inconsistent with Title VII principles and would effectively set a dual standard upon which contractors would be evaluated. A law firm commented that removing this requirement would be counterproductive as doing so would cause delays and reduce settlements.

In response, OFCCP notes that it did not propose adopting a blanket policy to disregard practical significance. As part of its enforcement, dating back before the publication of the 2020 rule, OFCCP has utilized practical significance measures where appropriate in compliance evaluations, based on the specific facts of the case. There is no professional consensus among statisticians and labor economists regarding an appropriate or actionable practical significance threshold for all cases of employment discrimination.⁴¹ Further, the text of Title VII contains no

⁴⁰ Practical significance refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group, focusing on the contextual impact or importance of the disparity rather than its likelihood of occurring by chance.

⁴¹ See Joseph L. Gastwirth et al, *On the Interplay Between Practical and Statistical Significance in Equal Employment Cases*, 20 *Law, Probability and Risk*, 69, 69-87 (2022), available at <https://doi.org/10.1093/lpr/mgac002> (last accessed June 22, 2022).

reference to practical significance,⁴² and the case law is unsettled as to whether Title VII specifically requires a finding of practical significance, and, if so, what level of practical significance is sufficient and appropriate.⁴³ Therefore, the final rule removes the regulatory requirement to demonstrate practical significance prior to issuing a Predetermination Notice or Notice of Violation. OFCCP will continue to utilize the concept of practical significance where appropriate, along with statistical significance, and all other evidence gathered in the review, as part of a holistic approach that applies the case law and statistical techniques as they evolve to the compliance evaluations it investigates, conciliates, and refers for enforcement.

d. General Comments Regarding the Evidentiary Standards

OFCCP also received general comments in favor of and against removing the evidentiary standards that the 2020 rule imposed on OFCCP's use of the Predetermination Notice and Notice of Violation. Commenters' concerns about removing the evidentiary standards for the Predetermination Notice generally aligned with their concerns regarding the Notice of Violation. Labor rights and advocacy organizations agreed with removing the evidentiary standards, asserting that these heightened evidentiary standards were not aligned with Title VII and impeded OFCCP's ability to enforce its legal authorities. Employer associations and law firms generally disagreed with removing the evidentiary standards. An employer association stated that the 2020 rule's evidentiary standards were beneficial because contractors could use the standards to replicate OFCCP's approach during their self-audits. OFCCP has concluded that the 2020

⁴² See Elliot Ko, Big Enough to Matter: Whether Statistical Significance or Practical Significance Should Be the Test for Title VII Disparate Impact Claims, 101 Minn. L.R. 869, 889 (2016) ("Title VII does not require plaintiffs to prove that an employment practice had a 'large' impact on a protected class. Title VII just requires plaintiffs to prove that 'a particular employment practice' had a disparate impact on a protected class.... Title VII only requires proof of a 'disparate impact,' not proof of a 'very' disparate impact that is large enough to warrant societal or moral condemnation.").

⁴³ Several circuit courts have held that a finding of practical significance is not required in order to satisfy a *prima facie* case of discrimination. See, e.g., *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014); *Apsley v. Boeing Co.*, 691 F.3d 1184 (10th Cir. 2012); *Stagi v. Nat'l R.R. Passenger Corp.*, 2010 WL 3273173 (3^d Cir. Aug. 16, 2010). Other circuit courts have considered measures of practical significance to varying degrees. See, e.g., *Brown v. Nucor Corp.*, 785 F.3d 895, 908, 935 (4th Cir. 2015); *Isabel v. City of Memphis*, 404 F.3d 404, 412, 418 (6th Cir. 2005); *Ensley Branch of NAACP v. Seibels*, 31 F.3d 1548, 1555 (11th Cir. 1994); *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2^d Cir. 1991); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428-29 (9th Cir. 1985); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 545 (5th Cir. 1980).

rule’s rigid evidentiary standards are not necessary for contractors to conduct self-audits. The agency provides extensive guidance and resources to assist contractors in conducting meaningful self-audits of their employment systems, including two recent public directives,⁴⁴ the FCCM, compliance assistance materials, technical assistance guides, online contractor courses, and webinars. Through these materials, OFCCP provides transparency on how the agency will conduct compliance evaluations and promote a proactive approach to compliance. Additionally, as discussed thoroughly in the NPRM and elsewhere in this final rule, the evidentiary standards that the 2020 rule required the agency to meet exceeded those required by Title VII in certain respects, and thus are particularly inappropriate to require in order to issue *preliminary* notices of *potential* discrimination issued while the agency’s investigation is still ongoing.

Employer associations and law firms also expressed concerns that removing the evidentiary standards would infringe on contractors’ due process by depriving them of the ability to evaluate alleged indicators of discrimination and impede their ability to meaningfully respond or correct problem areas. These commenters also stated that removing the evidentiary standards would lead to less transparency, resulting in lengthy disputes, fewer settlements, and increased litigation against the agency. Commenters also expressed concerns that removing the 2020 rule’s evidentiary standards would remove important “guardrails” against OFCCP’s enforcement where the agency does not have to meet any standards for issuing a Predetermination Notice or Notice of Violation and contractors would be subjected to a “vague, arbitrary, moving target.”

In response, OFCCP notes that there are significant legal guardrails retained in this final rule that address concerns raised by commenters with regard to due process. This final rule will require the agency to issue to contractors three separate notices regarding any preliminary findings or findings the agency makes related to discrimination before the agency makes a final

⁴⁴ See Directive 2022-02, *Effective Compliance Evaluations and Enforcement* (Mar. 31, 2022), available at <https://www.dol.gov/agencies/ofccp/directives/2022-02> (last accessed June 13, 2022); Directive 2022-01 Revision 1, *Advancing Pay Equity Through Compensation Analysis* (Aug. 18, 2022), available at <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1> (last accessed Aug. 25, 2022).

determination about whether to refer the matter to the Office of the Solicitor for enforcement. Each of these notices requires OFCCP to describe its findings to date and invite the contractor to respond. Prior to issuing a Predetermination Notice, OFCCP's field offices conduct thorough discussions of the preliminary findings of potential discrimination with senior leadership and consult with the Office of the Solicitor.⁴⁵ These offices also confer with the agency's Branch of Expert Services to discuss statistical analyses related to the preliminary findings of potential discrimination. Prior to issuing a Notice of Violation and a Show Cause Notice, the agency assesses the information provided by the contractor in response to a Predetermination Notice and Notice of Violation, respectively, and conducts further investigation as a result of the contractor's response as necessary. After OFCCP issues a Show Cause Notice, it refers the matter to the Office of the Solicitor, which conducts its own independent review of OFCCP's investigative findings to determine if it will file an administrative complaint. Beyond these significant legal guardrails, OFCCP notes that the pre-enforcement notice process provides an opportunity for contractors to provide relevant information to inform OFCCP's understanding of the issues before the matter may proceed to a judicial forum, which provides notice and the opportunity to be heard before an impartial tribunal. Additionally, given the agency's finite resources, OFCCP is strongly disincentivized to spend significant time pursuing cases that are unlikely to ultimately prove successful in court. Accordingly, OFCCP disagrees with the assertions that contractors are not afforded due process or that there are "no standards" that the agency needs to meet. Rather, the agency is largely returning to its long-standing pre-enforcement resolution practices in effect for decades prior to the 2020 rule, which have long provided a functional framework in which OFCCP and contractors have successfully conciliated hundreds of matters.

⁴⁵ See FCCM at 8B02 (last updated Jan. 7, 2021), available at <https://www.dol.gov/agencies/ofccp/manual/fccm> (last accessed June 13, 2022) (discussing consultation with senior leadership and the Office of the Solicitor).

Further, this final rule provides consistency in the formal notification and conciliation process. While this final rule removes the overly formulaic standards in the 2020 rule that have hindered early discussion of issues and effective enforcement, the agency finds it beneficial to codify the formal notices it uses to communicate with the contractor community about potential violations throughout the stages of a review. Accordingly, this final rule retains the required use of the Predetermination Notice and Notice of Violation while rescinding the evidentiary standards for issuance of the Predetermination Notice and Notice of Violation.

2. Predetermination Notice Provisions

a. Retaining the Use of the Predetermination Notice

In the NPRM, OFCCP proposed retaining the required use of the Predetermination Notice in the regulations to convey “preliminary indicators of discrimination” to the contractor. OFCCP received three comments from employer associations and a law firm supporting OFCCP’s proposal to retain the Predetermination Notice in the regulations because it provides contractors an opportunity to understand the potential discrimination identified by OFCCP and potentially resolve matters at an earlier stage. The agency agrees with these comments, and the final rule retains the required use of the Predetermination Notice. However, as discussed elsewhere in this final rule, OFCCP has replaced the term “preliminary indicators of discrimination” with “preliminary findings of potential discrimination,” to provide additional clarity in response to one of the public comments. By continuing to require the use of the Predetermination Notice, OFCCP furthers its commitment to transparency and fosters the exchange of information to promote an efficient resolution.

b. Issuing the Predetermination Notice

In the NPRM, OFCCP proposed distinguishing the Predetermination Notice from the Notice of Violation and streamlining the compliance evaluation process by issuing the Predetermination Notice earlier than the 2020 rule allowed, where appropriate, to give the

contractor an understanding of where the agency is seeing possible problems and focusing its investigative efforts. OFCCP will issue a Predetermination Notice to a contractor when it has preliminary findings of potential discrimination. OFCCP remains committed to providing notice of potential discrimination to contractors and as such has retained the required use of the Predetermination Notice in the final rule as discussed earlier in this preamble. In some instances, depending on the facts and circumstances of the particular compliance evaluation, OFCCP may provide this notice after the agency completes the desk audit. In many instances, however, it may be at a later stage of the investigation, such as after the conclusion of the on-site review or after OFCCP has completed its off-site analysis of the information obtained during the on-site review. Providing contractors notice of preliminary findings of potential discrimination through the Predetermination Notice facilitates understanding and efficient resolution. This provides contractors the opportunity to share additional information about their compliance in response to the concerns raised by OFCCP before the agency, if appropriate, issues a Notice of Violation.

Three comments addressed whether OFCCP should issue the Predetermination Notice based on preliminary indicators of discrimination. The commenters included a civil and human rights advocacy organization and two law firms. The civil and human rights advocacy organization expressed support, stating there is no requirement in applicable federal law that forces OFCCP to wait until it can prove a case of discrimination before engaging with a contractor to discuss preliminary indicators of discrimination. The two law firms did not support the change. One law firm believed that proceeding with a Predetermination Notice at a preliminary stage on the basis of “mere ‘indicators of discrimination’” marks a “radical shift” in OFCCP policy. This commenter expressed concern that OFCCP intended to issue

Predetermination Notices based solely on the results of the initial desk audit analyses that typically serve as the basis for follow-up requests for information.

OFCCP disagrees with this view that the proposal represents a “radical shift.” As explained earlier, this final rule largely returns to the procedures that existed for years prior to December 2020. To the extent this final rule is different than that prior process, it provides *more* certainty for contractors in that the rule codifies the requirement that the agency issue a Predetermination Notice in all matters involving potential discrimination. Further, the commenter may have misinterpreted the use of the term “indicators of discrimination” in the proposed regulatory text. To provide clarity, OFCCP has modified this portion of the final rule to remove the reference to “preliminary indicators of discrimination” and instead state that if a compliance evaluation indicates “preliminary findings of potential discrimination,” OFCCP will issue a Predetermination Notice describing those preliminary findings. As explained earlier in this preamble, this change in terminology is intended to convey that OFCCP will issue a Predetermination Notice only after OFCCP has reviewed the available evidence related to any disparity or other indicators and concluded that the record available suggests potentially unlawful discrimination. In the Predetermination Notice, OFCCP provides the contractor with information concerning the agency’s preliminary findings of potential discrimination and requests that the contractor provide any additional information or documentation the contractor believes OFCCP should consider before making a final determination of compliance.

This final rule allows OFCCP to tailor the issuance of the Predetermination Notice to the facts and circumstances of each compliance evaluation. By rescinding the rigid evidentiary standards, which functionally required that a *predetermination* notice could not be issued until the completion of the compliance evaluation, the final rule allows OFCCP to provide contractors with earlier written notice of preliminary findings of potential discrimination. This focuses the

contractor's attention on specific issues as early as possible, allowing a more streamlined and efficient transfer of information.

In the NPRM, in discussing when OFCCP will issue a Predetermination Notice after it has identified concerns indicating potential discrimination, OFCCP proposed changing the reference to "preliminary findings" to the term "preliminary indicators" to highlight the difference in purpose between the Predetermination Notice and the Notice of Violation.⁴⁶ The Predetermination Notice conveys OFCCP's analysis of preliminary findings of potential discrimination, provides the contractor a formal opportunity to respond with additional information, and is issued prior to the agency's final determination of compliance. The Notice of Violation provides OFCCP's findings of violation(s) and their corresponding required corrective action(s) and invites the contractor to voluntarily enter into a conciliation agreement. The contractor may also provide additional information regarding its compliance after receipt of the Notice of Violation, or after receipt of a Show Cause Notice, although earlier responses promote a more efficient and effective process for both the contractor and OFCCP. As discussed above, to avoid confusion about the term "indicators of discrimination," the final rule adopts the term "preliminary findings of potential discrimination."

Another law firm expressed concern that OFCCP could issue a Predetermination Notice after the desk audit and prior to the completion of the on-site phase of the compliance evaluation, noting that this could result in OFCCP issuing a Predetermination Notice prior to the contractor having any meaningful dialogue with the agency. The law firm believed issuing the Predetermination Notice prior to the completion of the on-site review would cause compliance officers to conduct an incomplete investigation and possibly make them vested in a particular outcome rather than conducting a full and neutral evaluation of the facts and circumstances of the particular compliance evaluation. As an initial matter, OFCCP does not agree with this assessment, which seems based in conjecture that, simply by issuing a Predetermination Notice

⁴⁶ 87 FR 16138, 16152-16154

earlier in the process to provide contractors with advance notice to understand and respond, compliance officers will conduct an inadequate investigation and become invested in a particular outcome. In addition, OFCCP will issue a Predetermination Notice to a contractor after OFCCP has reviewed the available facts and data and has reached a preliminary finding of potential discrimination.⁴⁷ The appropriate time to issue this notice will depend upon the facts and circumstances of each matter. The agency will continue to conduct an onsite review before issuing a Predetermination Notice where it determines that further information is beneficial to assess whether preliminary findings of potential discrimination exist. Furthermore, OFCCP will offer training to its compliance officers regarding the provisions of this final rule, and under what conditions a Predetermination Notice may be issued to promote consistency across regions.

The law firm further recommended that OFCCP require compliance officers to seek the contractor's explanation for any identified selection or compensation disparity prior to issuing the Predetermination Notice, and then include an evaluation of the contractor's position in the Predetermination Notice. OFCCP declines to adopt this suggestion. The resolution process set forth in the final rule related to Predetermination Notices remains the same as it always has been: the agency presents its preliminary findings, and then the contractor has an opportunity to respond. Building in an additional mandatory step to seek a response prior to issuing the Predetermination Notice would therefore be duplicative, which would run counter to the objective of this rule to increase efficiency. The Predetermination Notice is the first of three written notices in a multi-stage notification process that OFCCP uses to communicate preliminary findings of potential discrimination identified during a compliance evaluation. When OFCCP identifies preliminary findings of potential discrimination, it notifies the contractor and provides an opportunity for the contractor to respond. If after providing this opportunity, OFCCP finds a violation of an equal opportunity clause, the agency issues a Notice of Violation to the

⁴⁷ FCCM, Chapter 8E03, Signature Authority, available at <https://www.dol.gov/agencies/ofccp/manual/fccm/8e-predetermination-notice/8e03-signature-authority> (last accessed Dec. 1, 2022).

contractor requiring corrective action and inviting conciliation through a written agreement.⁴⁸ If necessary, OFCCP thereafter will issue a Show Cause Notice. Each of these notice steps already provides the contractor an opportunity to respond.⁴⁹ Further, the Predetermination Notice is far from the contractor's first communication with OFCCP during a compliance evaluation.

OFCCP's communication with the contractor begins even before the contractor's deadline to submit its response to the Scheduling Letter notifying the contractor that OFCCP has selected the contractor for a compliance evaluation and requesting its affirmative action programs and itemized listing information. Within 15 calendar days of sending the Scheduling Letter, OFCCP contacts the contractor, or the contractor's representative, or both. At that time, OFCCP answers any questions the contractor may have, provides technical assistance on the contractor's obligations and the compliance evaluation process, and provides an overview of what to expect during the evaluation.⁵⁰ OFCCP remains committed to regular and open communication by all parties at each stage of the compliance evaluation, further supporting OFCCP's overarching goal of providing notice of its findings throughout the process, allowing OFCCP and the contractor to resolve the matter efficiently.

This final rule adopts the proposal to retain agency-wide use of the Predetermination Notice when OFCCP has preliminary findings of potential discrimination, to advance OFCCP's commitment to transparency and clarity while ensuring consistency throughout its regions. The final rule also maintains the flexibility needed for OFCCP to provide notice to contractors of preliminary findings of potential discrimination by issuing the Predetermination Notice earlier in the compliance evaluation, where appropriate. This flexibility ensures that OFCCP can provide the contractor notice of potential discrimination concerns to facilitate understanding and efficient

⁴⁸ This process is discussed more fully in the Overview section above.

⁴⁹ See 41 CFR 60-1.33; 41 CFR 60-300.62; 41 CFR 60-741.62 (providing the contractor an opportunity to respond to the Predetermination Notice, Notice of Violation, and Show Cause Notice).

⁵⁰ See FCCM Chapter 1B04 Follow-Up Contact with Contractor and Jurisdiction Challenges, available at <https://www.dol.gov/agencies/ofccp/manual/fccm/1b-pre-desk-audit-actions/1b04-follow-contact-contractor-and-jurisdiction> (last accessed Nov. 15, 2022).

resolution. This benefits contractors by providing notice of preliminary findings earlier in the resolution process than the 2020 rule allowed with a full opportunity to respond.

c. Adding Violations Without Amending a Predetermination Notice

In the NPRM, OFCCP also proposed adding a provision to § 60-1.33(a) that would allow OFCCP to add violations in a subsequent Notice of Violation without amending the Predetermination Notice. The agency received two comments on this proposed modification, both from employer associations. One commenter stated that this proposal deprived contractors of the opportunity to defend themselves against incorrect conclusions drawn by OFCCP. Another commenter expressed concern that this change would eliminate the purpose of the Predetermination Notice as the contractor would not be able to engage in meaningful discussions regarding all possible violations.

After careful consideration of these comments, OFCCP has decided to move forward with this change, as proposed. The proposal provides sufficient opportunity for contractors to respond, as the Predetermination Notice is the first written notice in a notification and information exchange process with multiple stages. Following the Predetermination Notice, if the preliminary findings of potential discrimination are not adequately rebutted, the contractor has sufficient opportunities to respond following the Notice of Violation and Show Cause Notice, if issued. Throughout the process, contractors continue to have an opportunity to discuss any additional violations, confer with OFCCP, and provide relevant information for OFCCP's review and consideration. The Predetermination Notice is simply the first notice in this multi-stage process. Further, at the point OFCCP issues the Predetermination Notice, the agency may not have a full evidentiary record. Although the Predetermination Notice contains information on the preliminary findings of potential discrimination OFCCP has identified at that point in the investigation, OFCCP may make additional findings during this investigation, such as when it obtains additional information from the contractor or witnesses after the issuance of the Predetermination Notice. Issuing a new Predetermination Notice in these situations would be

inefficient and would postpone remedies for victims, as the agency would have to wait until all allegations went through the pre-enforcement stages before it could refer the case to enforcement. Issuing a new Predetermination Notice is also unnecessary, as the Notice of Violation and Show Cause Notice provide sufficient opportunity for the contractor to respond.⁵¹

d. Response Period for a Predetermination Notice

To promote greater efficiency in resolving potential discrimination, OFCCP also proposed to modify the 2020 rule's provision that required a contractor to provide a response within 30 calendar days of receiving a Predetermination Notice. The proposal would have returned the Predetermination Notice response period to the 15-calendar day period in effect prior to the 2020 rule, which OFCCP could extend for good cause. In the proposal, OFCCP also clarified this provision to state that any response must be received by OFCCP within 15 calendar days, absent an extension. OFCCP received eight comments regarding the Predetermination Notice response period. The commenters included employer associations, law firms, a women's rights legal advocacy organization, a labor rights organization, and a civil and human rights advocacy organization.

Three of the commenters, including the labor rights and advocacy organizations, supported OFCCP's proposal to return to a 15-calendar day period. These commenters noted that the Predetermination Notice is a preliminary notification that engages employers in a dialogue with the agency and that a longer response period potentially prolongs discrimination and delays securing a remedy for victims of discrimination.

Five commenters, including employer associations and law firms, opposed returning to a 15-calendar day response period. The commenters expressed concern that 15 calendar days is an insufficient amount of time to review, evaluate, and respond to the Predetermination Notice because it may be the first notice the contractor receives after a complex investigation. Also, in

⁵¹ See 41 CFR 60-1.33; 41 CFR 60-300.62; 41 CFR 60-741.62 (providing the contractor an opportunity to respond to the Predetermination Notice, Notice of Violation, and Show Cause Notice).

some situations, the contractors may choose to retain experts to understand the information provided which may require more than 15 calendar days. They also expressed concerns that OFCCP would not use its discretion to grant extensions for good cause. Three commenters proposed a response period of at least 60 days. One of the commenters recommended a two-phase response in which a contractor first has 30 days to review and reply with any questions and then, after the contractor's questions have been answered, a second 60-day period in which to provide a substantive response.

After careful consideration of these comments, OFCCP has decided to keep the 15-calendar day response period.⁵² In so doing, OFCCP notes that this is consistent with the time originally permitted for responses in its 2018 Predetermination Notice Directive.⁵³ Prior to the 2020 rule, contractors were generally providing responses within this 15-day timeframe or receiving extensions for good cause. With this modification, OFCCP will continue to provide extensions to contractors where OFCCP determines the request is supported by good cause. Further, while the Predetermination Notice is the first formal notice that the agency provides, OFCCP communicates with the contractor about the preliminary findings before a Predetermination Notice is even issued.

OFCCP declines to adopt a multi-stage response period to the Predetermination Notice. OFCCP determined that a two-phase response period in which a contractor first has 30 days to review and reply with any questions and then, after the contractor's questions have been answered, a second 60-day period in which to provide a substantive response would introduce confusion about when a contractor needs to respond to the preliminary findings of potential discrimination and would prolong the pre-enforcement process. This 15-day response period will allow OFCCP to move compliance evaluations along expeditiously, while providing contractors

⁵² The final rule clarifies that OFCCP must receive the contractor's response within 15 calendar days.

⁵³ See Directive 2018-01, Use of Predetermination Notices, (Feb. 27, 2018), available at <https://www.dol.gov/agencies/ofccp/directives/2018-01> (last accessed Dec. 1, 2022).

with a reasonable period to review and respond to the Predetermination Notice and the opportunity to obtain an extension if needed.

e. Responding to Evidence Provided by a Contractor in Advance of Issuing a Notice of Violation

A law firm requested that the regulations state specifically that OFCCP must address the employer's evidence provided in response to the Predetermination Notice prior to issuing a Notice of Violation. OFCCP did not propose this additional requirement in the NPRM. OFCCP declines to include this requirement in the final rule. Should the agency decide to issue a Notice of Violation, it will incorporate relevant information that the contractor provides in response to the Predetermination Notice. Requiring another pre-enforcement notice or response letter would be duplicative, and a regulation requiring that OFCCP address the employer's evidence is likely to generate dispute over the application and meaning of such a requirement. As part of its investigations, OFCCP carefully reviews and considers the evidence provided, and the agency determines what information is relevant and how best to respond to contractors' concerns. In making this determination, OFCCP will continue to engage with the contractor throughout the compliance evaluation process to promote a mutual understanding of the issues.

3. Notice of Violation Provisions

In § 60-1.33(b), OFCCP proposed adding a provision that will allow the agency to include additional violations in a subsequent Show Cause Notice without amending the Notice of Violation. The reasons for allowing this are the same as the reasons discussed above for allowing OFCCP to include new findings in a Notice of Violation that were made after a Predetermination Notice had already been issued. An employer association expressed concern that adding a violation in a subsequent Show Cause Notice without amending the Notice of Violation would limit a contractor's ability to respond to and rebut OFCCP's findings. However, in the proposal, OFCCP addressed this concern by explicitly stating in the regulations that the agency will provide contractors an opportunity to conciliate additional violations identified in the Show

Cause Notice. If OFCCP's investigation identifies additional violations at a later stage, requiring OFCCP to restart the three-stage notice process from the beginning creates yet more inefficiency, as the agency would have to wait until all allegations went through the pre-enforcement stages before it could refer the case to enforcement. This negatively impacts workers by prolonging the resolution of discrimination findings and constraining OFCCP's ability to effectively enforce its protections.

4. Conciliation Agreements

In the NPRM, OFCCP proposed minor changes to the existing provisions at § 60-1.33(c). The proposed changes included clarifying that the written agreement required to resolve a material violation of the equal opportunity clause is a "written conciliation agreement" that identifies the violations and/or deficiencies. The proposal also clarified the remedial actions which may be necessary to correct the identified violations and/or deficiencies. OFCCP received no comments on these proposed changes. Accordingly, OFCCP adopts these changes in the final rule as proposed.

5. Clarifications to the Show Cause Notice Provisions

In § 60-1.33(d) of the NPRM, OFCCP proposed to clarify its use of the Show Cause Notice including when a contractor denies access to its premises, to witnesses, or to records. The proposed changes also clarify that the Show Cause Notice will include each violation that OFCCP has identified at the time of issuance and, where OFCCP identifies additional violations after issuing a Show Cause Notice, OFCCP will modify or amend the Show Cause Notice. OFCCP received no comments regarding the proposed provision. Accordingly, OFCCP adopts the proposed provision without any changes in the final rule.

For clarity, OFCCP also proposed relocating the "Show Cause Notices" provisions to § 60-1.33 with the other pre-enforcement notices in part 60-1 and removing and reserving § 60-

1.28. OFCCP did not receive any comments on this change and adopts it into the final rule as proposed.

6. Expedited Conciliation

In the NPRM, OFCCP proposed retaining the expedited conciliation option and made general edits to improve procedural efficacy and clarify OFCCP's role in the expedited conciliation process. The agency received four comments addressing expedited conciliation. Commenters included employer associations, a women's rights legal advocacy organization, and a civil and human rights advocacy organization. All commenters supported retaining the expedited conciliation option in the regulations, noting that this option improves efficiency and promotes expeditious resolutions. OFCCP did not receive any comments regarding the proposed clarifying edits to the expedited conciliation provisions. Accordingly, the final rule adopts the changes as proposed.

7. Reasonable Efforts Standard

In the NPRM, OFCCP proposed to modify § 60-1.20(b) to clarify that the "reasonable efforts" standard that OFCCP must satisfy when attempting to secure compliance with its authorities through conciliation and persuasion should be interpreted consistent with Title VII language requiring EEOC to "endeavor to" remedy discrimination through conciliation, persuasion, and conference.⁵⁴ OFCCP proposed two modifications to § 60-1.20(b), first adding a clause stating OFCCP will make reasonable efforts to secure compliance through conciliation and persuasion pursuant to § 60-1.33. Second, OFCCP proposed that its regulatory "reasonable efforts" standard must be interpreted consistently with EEOC's "endeavor" standard.⁵⁵ OFCCP received one comment from a law firm regarding these modifications. The commenter opposed the modifications, stating that reliance on the Supreme Court's interpretation of Title VII's

⁵⁴ 42 U.S.C. 2000e-5(b)

⁵⁵ The NPRM included an extended discussion of the EEOC's conciliation procedures, including a law passed by Congress that disapproved and annulled a rule which codified rigid requirements the EEOC had to meet during conciliation, which we include here by reference.

conciliation provisions in *Mach Mining v. EEOC*, 575 U.S. 480, 486 (2015), is misplaced because the Court analyzed the specific Title VII conciliation provision, which does not contain the “reasonable efforts” requirement found in E.O. 11246. In response to this comment, OFCCP notes that it is well established that the legal standards developed under Title VII apply to cases brought under E.O. 11246.⁵⁶ That principle should apply here because OFCCP’s regulation is functionally similar in purpose and meaning to the section of Title VII that the Supreme Court analyzed in *Mach Mining*. Where OFCCP finds deficiencies in a compliance evaluation, OFCCP’s regulation requires it to make “reasonable efforts...to secure compliance through conciliation and persuasion.”⁵⁷ Similarly, where EEOC believes a charge of discrimination is true, it must “endeavor to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”⁵⁸ A plain reading of the text in both provisions indicates a similar purpose and meaning: to attempt to resolve discrimination through conciliation and informal means like persuasion and communication. Given that OFCCP traditionally applies Title VII principles to the interpretation and application of E.O. 11246, and given the similarity between the two provisions, OFCCP determined that the text of its regulations on securing compliance to remedy discrimination through conciliation should be interpreted to be consistent with the Title VII provision on endeavoring to eliminate unlawful discrimination by conciliation. This interpretation would be consistent with a stated policy goal of this final rule to align the regulations with Title VII standards, to ensure that OFCCP has the same flexibility as EEOC in the administration of its authorities. For these reasons, OFCCP adopts this modification as proposed.

⁵⁶ See *Greenwood Mills, Inc.*, 2002 WL 31932547, at *4.

⁵⁷ See 41 CFR 60-1.20(b).

⁵⁸ 42 U.S.C. 2000e-5(b)

8. Severability Clauses

In the NPRM, OFCCP proposed deleting the severability clause that applied just to certain sections of OFCCP's regulations and replace it with severability clauses covering the entirety of each part of OFCCP's regulatory scheme. OFCCP received no comments on this issue and adopts this change into the final rule, as proposed.⁵⁹

9. Reasonable Reliance Interests

OFCCP received a comment from a law firm stating that the NPRM did not address contractors' reasonable reliance interests during pending compliance evaluations. Although the commenter did not cite any specific reliance interests, it did state its belief that pre-enforcement notices already issued should be held to conform to the regulatory standards in existence at the time the notice was issued and asserted that OFCCP's proposal did not address this issue. A women's rights legal advocacy organization stated that OFCCP's need to fulfill its mission and mitigate the harm of discrimination outweighs any reliance interests by contractors. It noted that the Title VII framework has long applied to OFCCP's compliance process and noted that the agency already publicly stated its intention to modify the 2020 rule in 2021.

Reliance interests are one factor among many that agencies must consider during rulemaking.⁶⁰ While "[a]gencies are not compelled to explore 'every alternative device . . . [they are] required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.'"⁶¹ The 2020 rule took effect on December 10, 2020, approximately 16 months before OFCCP issued the NPRM proposing to modify the 2020 rule; prior to the 2020 rule, OFCCP relied on well-established Title VII principles in its pre-enforcement and notice and conciliation procedures. Considering the short period of time the 2020 rule was in place, OFCCP determined that restoring flexibility

⁵⁹ Beyond these severability clauses, OFCCP did not consider nor propose making any additional changes to the existing regulations at 41 CFR parts 60-2, 60-3, 60-4, 60-20, 60-30, 60-40, and 60-50, and any comments regarding those parts were not considered and responded to as they were beyond the scope of the proposed rule.

⁶⁰ See *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914 (2020).

⁶¹ *Id.* at 1916 (internal citations omitted).

to its pre-enforcement process by relying on well-established Title VII standards in an effort to more efficiently resolve findings of discrimination outweighs any possible reliance interest the 2020 rule may have created among the regulated community.

For clarification, this final rule would apply to any pre-enforcement notices and actions issued on or after the effective date of this rulemaking, 30 days after publication in the *Federal Register*. For example, OFCCP may have issued a Predetermination Notice to a contractor under the standards in the 2020 rule, but if it then proceeds to issue a Notice of Violation or Show Cause Notice after the effective date of this final rule, the standards in this final rule would apply to those notices. OFCCP believes that through the notice and comment process, the agency has adequately provided contractors with notice of the changes. OFCCP will also continue to support contractors in understanding this final rule through compliance assistance materials.

10. Comments Regarding the Need for the Rulemaking

OFCCP received four comments that emphasized the need for modifying the 2020 rule. The commenters included a women's rights legal advocacy organization, a civil and human rights advocacy organization, a labor rights organization, and an individual. These commenters described the prevalence of employment discrimination against workers and asserted that the 2020 rule's onerous requirements prevented OFCCP from effectively enforcing its nondiscrimination authorities. They believed that modifying the 2020 rule would restore the flexibility the agency needs to carry out its important mission of protecting workers.

OFCCP received five comments from employer associations and law firms that believed that the agency failed to show how the 2020 rule constrained its enforcement efforts. For example, one of these commenters stated that the Administrative Procedure Act (APA) requires that revisions to existing regulations be firmly based on a substantial factual record, and that

OFCCP failed to meet this requirement.⁶² This commenter asserted that the NPRM proposed “sweeping changes” without any factual basis, and compared this with the 2020 rule, which the commenter asserted had provided “extensive” factual justification. Despite this assertion, the comment did not identify with any specificity any facts underlying the 2020 rule, let alone what comprised an “extensive” factual justification.

At the outset, we note the regulations at issue here are distinguishable from those analyzed in the cases the commenter cites, which created or rescinded standards applicable to regulated entities and thus affected the burdens of compliance for those regulated entities. In contrast, the 2020 rule, and this rule, deal entirely with the internal standards to which the agency will hold itself during the conduct of compliance evaluations prior to enforcement. The 2020 rule explicitly noted that it was undertaken as “an exercise of enforcement discretion” that was not “compelled... by Title VII or OFCCP case law,” and further “add[ed] no new requirements or burdens on contractors.”⁶³

Nevertheless, as explained in the NPRM, and again here, OFCCP has identified a factual basis to conclude the 2020 rule has not met the objectives it asserted. When promulgating the 2020 rule, OFCCP stated that it believed the rule would “increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP enforcement proceedings, and enhance the efficient enforcement of the law.”⁶⁴ Further, two stated objectives of the 2020 rule were to increase the number of contractors the agency evaluates and focus on resolving stronger cases through the strategic allocation of limited agency resources.⁶⁵ However, the 2020 rule has not met these objectives. While the 2020 rule acknowledges that the heightened evidentiary

⁶² This comment also stated that the NPRM failed to meet the basic requirements of the APA because the agency failed to consider “less disruptive” alternatives to the proposed rule. OFCCP disagrees with this comment. As detailed in the “Alternatives” discussion in the Regulatory Procedures section below, OFCCP carefully considered alternatives when proceeding with this rulemaking and determined that proceeding with the rulemaking as proposed would enable the agency to best meet its mission and ensure equal employment opportunity.

⁶³ 85 FR 71554; 87 FR 16151.

⁶⁴ 85 FR 71554.

⁶⁵ *Id.*

standards are not compelled by Title VII,⁶⁶ some contractors have nonetheless asserted that OFCCP must meet the heightened evidentiary standards to prove discrimination in cases. The NPRM described specific examples of this problem based on OFCCP's experience enforcing the 2020 rule, including:

- Contractors asserting that the evidence that OFCCP shared to support its case failed to meet the "qualitative evidence" definition included in the 2020 rule.⁶⁷
- Contractors asserting that the qualitative evidence that OFCCP provided was insufficient because the agency failed to disclose the identity of the interviewees who provided relevant statements at the Predetermination Notice stage;⁶⁸ and
- Contractors disputing whether OFCCP met the required threshold for practical significance under the 2020 rule, arguing that the agency has failed to meet the threshold or even disagreeing with the 2020 rule's standard altogether.⁶⁹

As these examples illustrate, the 2020 rule has not met its stated objectives to increase clarity and promote efficiency. Rather, the evidentiary mandates have spawned collateral disputes that hinder OFCCP's ability to pursue cases that would otherwise be actionable under Title VII's more flexible standards. By rescinding the 2020 rule's heightened evidentiary standards, OFCCP can restore its enforcement discretion as to the cases it decides to pursue and return to its long-standing practice of applying Title VII principles to the facts and circumstances of each compliance evaluation, a process which applies established evidentiary standards under Title VII.

The commenter also noted the agency's rationale for rescinding the requirement to provide qualitative evidence when issuing a Predetermination Notice is based on "pure speculation" that the disclosure of such evidence may have a chilling effect. While the agency

⁶⁶ 87 FR 16138.

⁶⁷ 87 FR 16138, 16145.

⁶⁸ *Id.*

⁶⁹ *Id.*

maintains that the 2020 rule's requirement to disclose anecdotal evidence creates a risk of chilling workers from coming forward, we note that the NPRM, and in turn this final rule, in fact relied on multiple rationales for rescinding the requirement to provide qualitative evidence. For example, requiring proof of qualitative evidence before issuing a Predetermination Notice is not only inconsistent with Title VII standards and interpretive case law, but such evidence may not yet be available to the agency at such a preliminary investigative stage.⁷⁰ Ultimately, OFCCP has found that the 2020 rule's inflexible evidentiary requirements, which apply while the matter is still under investigation and OFCCP is making *preliminary* findings, have hindered the agency's ability to pursue potentially actionable cases.

The commenter also asserted that the NPRM failed to explain its rationale as to how mandating the same evidentiary requirements for the Predetermination Notice as the Notice of Violation creates inefficiency. To the contrary, in the NPRM and in this final rule, OFCCP has discussed the distinct purposes that the Predetermination Notice and the Notice of Violation are intended to serve. Specifically, the Predetermination Notice is intended to provide the contractor with early notice of the agency's preliminary findings of potential discrimination, allowing the contractor to focus on specific, discrete areas of concern *prior to a finding of violation*, thereby facilitating an early exchange of information and shared understanding that in turn could lead to faster resolutions. By contrast, the 2020 rule's heightened evidentiary requirements functionally required the agency to complete its entire investigation and have litigation-ready evidence at hand before it could issue a *preliminary* notice to the contractor regarding its investigation. Imposing these same heightened evidentiary standards to both the Predetermination Notice and the Notice of Violation created duplication in the use of these notices. By removing these barriers, OFCCP is able to utilize the Predetermination Notice to provide notice of preliminary

⁷⁰ *Id.* at 16143-45.

findings of potential discrimination at an earlier stage before the agency has made findings to support a Notice of Violation⁷¹

As illustrated by the case examples above, OFCCP has found that the stated intentions in the 2020 rule are not being fulfilled, and indeed in some situations have hindered OFCCP's ability to efficiently resolve preliminary findings of potential discrimination. Accordingly, OFCCP has provided a reasoned explanation for modifying the 2020 rule—the agency has demonstrated benefits to both the agency and contractors by modifying the 2020 rule, including alignment with well-established standards under Title VII and strengthening OFCCP's ability to bring meritorious cases. The agency has also shown it believes these modifications to be better than the requirements set forth in the 2020 rule to effectuate efficient enforcement.⁷²

Some commenters also stated that the rule has not been in effect for enough time to warrant revisions. These groups generally expressed favorable opinions of the 2020 rule, with some asserting that it promoted certainty, efficiency, and transparency in OFCCP's enforcement. OFCCP disagrees with these comments. As described in the NPRM and repeated herein, soon after implementation, OFCCP saw that the 2020 rule's heightened evidentiary standards spawned collateral disputes about the interpretation of these evidentiary standards and hampered OFCCP's ability to provide contractors with notification of preliminary findings of potential discrimination.

B. Modifications to 41 CFR parts 60-300 and 60-741

OFCCP has separate regulations for E.O. 11246, VEVRAA, and Section 503. In the Section 503 and VEVRAA regulations, OFCCP proposed parallel changes to the definitions,

⁷¹ *Id.*

⁷² *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating that an agency “need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one”); *id.* at 537 (stating that when changing or modifying policy, an agency may act arbitrarily and capriciously if it ignores or countermands its earlier factual findings without reasoned explanation for doing so) (Kennedy, J. concurring in part and concurring in judgment); *see also Bernhardt*, 472 F. Supp. 3d at 591 (explaining that the standard of review for assessing whether an agency action is arbitrary and capricious is “‘highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision’”) (citing *Nw. Ecosystem All. V. United States Fish & Wildlife Serv.*, 475 F. 3d 1136, 1140 (9th Cir. 2007) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000))).

evidentiary requirements, and pre-enforcement and resolution procedures as those described above for E.O. 11246. No commenter suggested that these changes should apply differently depending on the authority the agency is enforcing. For the reasons discussed above, OFCCP thus adopts the same modifications and provisions in 41 CFR part 60-300 (VEVRAA) and 41 CFR part 60-741 (Section 503) that are described above for the E.O. 11246 regulations.

C. Other Comments

OFCCP received two comments that are not addressed above because they lacked relevance to the proposed rule.

V. Regulatory Procedures

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Under Executive Order 12866 (E.O. 12866), the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of E.O. 12866 and OMB review. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. This final rule has been designated a "significant regulatory action," although not significant within the scope of section 3(f)(1) of E.O. 12866. OMB has reviewed the final rule.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated the rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

Executive Order 13563 (E.O. 13563) directs agencies to adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

1. Need for Rulemaking

As discussed in the preamble, OFCCP received comments both supporting and opposing the proposal. Those that supported the proposal agree that the 2020 rule imposed onerous evidentiary standards that are inconsistent with the preliminary nature of the pre-enforcement notices, required OFCCP to share unnecessarily detailed evidence with contractors during the investigatory stage, and made it more difficult for the agency to protect workers from discrimination. These commenters remarked that the heightened requirements conflict with Title VII and OFCCP precedent, and had no basis in law and imposed unnecessary, burdensome, and confusing enforcement standards onto OFCCP’s pre-enforcement processes that serve to hamper the ability of OFCCP to engage with Federal contractors at the earliest stages to remedy potential discrimination.

Commenters in opposition generally stated the 2020 rule provided transparency, efficiency, and clarity to contractors and argued OFCCP did not provide enough evidence in the proposal to modify the 2020 rule. For example, one commenter asserted that rescinding the 2020 rule would prevent both OFCCP compliance officers and contractors from focusing resources on true problem areas, leading to longer, less efficient reviews.

After considering the comments received, OFCCP concluded the 2020 rule created rigid constraints, many of which are not required by Title VII and are particularly inappropriate to apply to *preliminary* notices long before the agency has committed to bring an enforcement action. OFCCP determined that the 2020 rule narrowed the scope of the agency's authority to protect workers and impeded the agency's effective enforcement of E.O. 11246, Section 503, and VEVRAA. The 2020 rule prescribed that OFCCP could only issue a Predetermination Notice if it provided certain quantitative evidence and qualitative evidence, with only limited exceptions. Under the 2020 rule, if after providing the contractor an opportunity to respond to the Predetermination Notice, OFCCP found a violation of an equal opportunity clause, OFCCP issued a Notice of Violation, which imposed the same rigid parameters that it imposed on the Predetermination Notice. The purpose of a Predetermination Notice is to provide the contractor with prompt written notice of preliminary findings of potential discrimination and to provide the contractor an opportunity to respond with additional information. As illustrated by the case examples discussed above, requiring the agency to meet heightened and formulaic standards of proof before it can proceed with notifying the contractor of preliminary findings of potential discrimination has limited the agency's ability to efficiently conduct a compliance review tailored to the facts and evidence presented. In addition, the 2020 rule has resulted in collateral disputes at the Predetermination Notice stage over the implementation of the rule's regulatory standards—diverting limited agency and contractor resources away from resolving concerns of discrimination. As discussed above, this diversion of resources has hindered OFCCP's ability to pursue meritorious cases.

This final rule aims to create a streamlined, efficient, and flexible process to ensure OFCCP utilizes its limited resources as strategically as possible to advance the agency's mission. In a return to agency policy prior to the 2020 rule, in place since 1988, OFCCP will require a case-by-case evaluation of the facts and circumstances of each compliance evaluation, including during the pre-enforcement notice and conciliation stages. Doing so will remove unnecessary

constraints that impede effective enforcement and delay resolutions. Removing the blanket regulatory requirements applied to early, pre-enforcement procedural notices will also allow OFCCP to pursue enforcement in the full scope of cases that would be actionable under Title VII rather than the more limited scope of fact patterns that conform to the evidentiary requirements set forth under the 2020 rule. OFCCP remains committed to providing contractors with an explanation of the basis for the agency's preliminary findings of potential discrimination during a compliance evaluation. Such notice is mutually beneficial for OFCCP and the contractor under review because it provides the contractor with an earlier opportunity to respond to potential issues before OFCCP makes a determination on violations. Providing earlier notice to contractors can result in the prompt and mutually satisfactory resolution of compliance evaluations, which minimizes unnecessary burdens on contractors and agency staff. Going forward, OFCCP will provide updated training to its compliance officers on the pre-enforcement procedures. This training will reflect current case law and provide consistency across the agency, while providing OFCCP needed flexibility to adapt to the legal standards and statistical techniques as they evolve.

2. Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the final rule. OFCCP utilizes the Employment Information Report (EEO-1) data, which identifies the number of supply and service contractors that could be scheduled for a compliance evaluation and thus impacted by the rule. The EEO-1 Report must be filed by covered Federal contractors that: (1) have 50 or more employees; (2) are prime contractors or first-tier subcontractors; and (3) have a contract, subcontract, or purchase order amounting to \$50,000 or more. OFCCP schedules only contractors that meet those thresholds for compliance evaluations. The number of supply and service contractors possibly impacted by the rule is 19,586.⁷³

⁷³ OFCCP obtained the total number of supply and service contractors from the most recent EEO-1 Report data available, which is from fiscal year (FY) 2020.

OFCCP also utilizes USASpending data, which identifies the number of construction contractors that could be scheduled for a compliance evaluation and thus impacted by the rule. The USASpending data accounts for all construction contractors with contracts greater than \$10,000 that meet the thresholds for compliance evaluations. The number of construction contractors possibly impacted by the proposed modification is 11,557.⁷⁴

The total number of contractors eligible to be scheduled that are possibly impacted by the rule is 31,143.⁷⁵ While OFCCP acknowledges that all Federal contractors that could be scheduled for a compliance evaluation may learn the requirements to comply with the laws that OFCCP enforces, only those contractors who are actually scheduled are likely to have a need to know the pre-enforcement procedures and will be directly impacted by the rule. For this reason, the total number of contractors impacted by the final rule is likely an overestimation because not all of the eligible contractors will be scheduled for a compliance evaluation.

OFCCP has determined that either a Human Resources Manager (SOC 11-3121) or a Lawyer (SOC 23-1011) would review the rule. OFCCP estimates that 50 percent of the reviewers would be human resources managers and 50 percent would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resources managers and lawyers. The mean hourly wage of a human resources manager is \$65.67, and the mean hourly wage of a lawyer is \$71.17.⁷⁶

Therefore, the average hourly wage rate is \$68.42 $((\$65.67 + \$71.17)/2)$. OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. OFCCP uses a fringe

⁷⁴ OFCCP obtained the total number of construction contractor establishments from the FY 2021 USASpending data, available at https://www.usaspending.gov/#/download_center/award_data_archive (last accessed August 15, 2022).

⁷⁵ 19,586 supply and service contractors + 11,557 construction contractors = 31,143 contractors.

⁷⁶ BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2021, available at https://www.bls.gov/oes/current/oes_nat.htm (last accessed June 9, 2022).

benefits rate of 45 percent⁷⁷ and an overhead rate of 17 percent,⁷⁸ resulting in a fully loaded hourly compensation rate of \$110.84 ($\$68.42 + (\$68.42 \times 45 \text{ percent}) + (\$68.42 \times 17 \text{ percent})$). The estimated labor cost to contractors is reflected in Table 1, below.

Table 1. Labor Cost				
<i>Major Occupational Groups</i>	<i>Average Hourly Wage Rate</i>	<i>Fringe Benefit Rate</i>	<i>Overhead Rate</i>	<i>Fully Loaded Hourly Compensation</i>
Human Resources Managers and Lawyers	\$68.42	45%	17%	\$110.84

a. Cost of Rule Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for a rule the estimated time it takes for contractors to review and understand the instructions for compliance. To minimize the burden, OFCCP will publish compliance assistance materials regarding the final rule.

OFCCP received one comment opposing the burden estimate of 30 minutes for rule familiarization. The commenter stated, “While reading time for the NPRM *per se* may be 30 minutes for the fastest of readers, it will be impossible to understand the background, history, and practical implications of the new rule.”

OFCCP considered the comment and declines to make any changes in the final rule. Both the NPRM and this final rule state that the 30-minute estimate for rule familiarization is the

⁷⁷ BLS, Employer Costs for Employee Compensation, available at <https://www.bls.gov/ncs/data.htm> (last accessed August 15, 2022). Wages and salaries averaged \$28.16 per hour worked in March 2022, while benefit costs averaged \$12.74, which is a benefits rate of 45 percent.

⁷⁸ Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program,” (June 10, 2002), available at www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005 (last accessed June 9, 2022).

average amount of time it will take someone to familiarize themselves with the new regulations by reading the regulatory text. OFCCP emphasizes that the 30-minute estimate is an average across all contractors and acknowledges that the precise amount of time each company will take is difficult to estimate.

OFCCP believes that a human resources manager or lawyer will take a minimum of 30 minutes (.5 hours) to read the regulatory text. Consequently, the estimated burden for rule familiarization is 15,572 hours (31,143 contractor firms \times .5 hours). OFCCP calculates the total estimated cost of rule familiarization as \$1,726,000 (15,572 hours \times \$110.84/hour) in the first year, which amounts to a 10-year annualized cost of \$196,446 at a discount rate of 3 percent (which is \$6.31 per contractor firm) or \$229,667 at a discount rate of 7 percent (which is \$7.37 per contractor firm). Table 2, below, reflects the estimated rule familiarization costs.

Table 2. Rule Familiarization Cost	
Total number of contractors	31,143
Time for rule familiarization	30 minutes
Human Resources Managers fully loaded hourly compensation	\$110.84
Rule familiarization cost in the first year	\$1,726,000
Annualized cost with 3 percent discounting	\$196,446
Annualized cost per contractor with 3 percent discounting	\$6.31
Annualized cost with 7 percent discounting	\$229,667
Annualized cost per contractor with 7 percent discounting	\$7.37

b. Benefits

E.O. 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important and states that agencies may consider such benefits. This rule has several benefits, including equity and fairness benefits, which are explicitly recognized in E.O.

13563. Key benefits include:

- Supporting more effective enforcement of OFCCP's equal opportunity laws by eliminating procedural inefficiencies and heightened evidentiary standards created by the 2020 rule;
- Facilitating earlier and more efficient resolutions;
- Ensuring greater certainty and consistency in case resolutions by maintaining adherence to Title VII and OFCCP case law standards;
- Promoting transparency by codifying the required use of the Predetermination Notice when the agency identifies preliminary findings of potential discrimination;
- Allowing OFCCP to tailor the pre-enforcement process to the specific facts and circumstances of each case, consistent with judicial interpretations of the applicable legal authorities as they evolve, which will in turn allow OFCCP to more effectively redress unlawful discrimination;
- Advancing a policy of promoting consistency between Title VII and E.O. 11246 and removing unnecessary constraints on the agency's ability to pursue meritorious cases. This approach will help OFCCP advance the overriding policy goal of promoting nondiscrimination by strengthening the enforcement of federal protections under E.O. 11246;
- Reducing time-consuming disputes over unnecessary standards that are inherently fact-specific; and
- Furthering the strategic allocation of agency resources.

3. Alternatives

In response to the NPRM, OFCCP received one comment stating the agency's proposed modifications did not meet the APA requirement of considering less disruptive alternatives. However, OFCCP clearly addressed the alternatives in the NPRM and describes in detail the alternative approaches that were considered prior to finalizing the rule below.⁷⁹

Specifically, OFCCP considered maintaining the current regulations established in the 2020 rule. However, as discussed earlier in this preamble, OFCCP determined that creating rigid regulatory standards to govern its pre-enforcement compliance evaluation notice and conciliation procedures is incompatible with the flexibility needed for effective enforcement. Moreover, the 2020 rule places certain obligations on OFCCP at this preliminary stage before its review can proceed that go beyond the substantive legal requirements that E.O. 11246, Title VII, and interpretive case law require to state a claim and prove discrimination at a much later stage, upon a full evidentiary record. OFCCP has determined that imposing such rigid and heightened standards early in its pre-enforcement proceedings unduly constrains its ability to pursue the full range of discrimination under its authority. The 2020 rule also created an inefficient process where OFCCP's Predetermination Notice (intended to notify the contractor of potential discrimination and to invite the contractor to provide additional information on its compliance before OFCCP makes its determination) and the Notice of Violation (intended to inform the contractor of violations that require corrective action and to invite conciliation through a written agreement) were largely duplicative. Further, mandating regulatory requirements to make inherently fact-specific determinations invites time-consuming disputes over the application of the rule's requirements, as OFCCP has already experienced in compliance evaluations since the 2020 rule took effect. Modifying the 2020 rule helps restore the enforcement discretion and flexibility OFCCP needs to facilitate compliance through conciliation by providing pre-enforcement notice of preliminary findings of potential discrimination and findings of

⁷⁹ See 87 FR 16138, 16151 (describing alternative approaches OFCCP considered).

discrimination and applying Title VII to the facts and circumstances of each compliance evaluation. OFCCP is modifying the regulatory text to create a more streamlined and effective process for the agency to communicate preliminary findings of potential discrimination to contractors, provide contractors an opportunity to respond, notify contractors of violations, and ultimately facilitate greater understanding to obtain resolution through conciliation.

OFCCP also considered modifying the 2020 rule to rescind the entirety of the rule except the correction to OFCCP's agency head title or modifying the 2020 rule by eliminating the Predetermination Notice entirely since it currently functions as a procedural redundancy. However, OFCCP determined that retaining both pre-enforcement notices in the regulatory text while rescinding the inflexible evidentiary requirements for the Predetermination Notice and Notice of Violation allows the contractor and OFCCP to engage in earlier discussions that can lead to more efficient resolutions.

B. Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.” Pub. L. 96-354, section 2(b). The RFA requires agencies to consider the impact of a regulatory action on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a regulatory action would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the regulatory action would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. *See id.* However, if the agency determines that the regulatory action would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the

agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must provide the factual basis for this determination.

The final rule will not have a significant economic impact on a substantial number of small entities. The first-year cost for small entities at a discount rate of 7 percent for rule familiarization is \$51.80 per entity which is far less than 1 percent of the annual revenue of the smallest of the small entities affected by the rule. Accordingly, OFCCP certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there would be no new requirement for information collection associated with this final rule. The information collections contained in the existing Executive Order 11246, Section 503, and VEVRAA regulations are currently approved under OMB Control Number 1250-0001 (Construction Recordkeeping and Reporting Requirements), OMB Control Number 1250-0003 (Supply and Service Program), OMB Control Number 1250-0004 (Recordkeeping and Reporting Requirements Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as Amended), and OMB Control Number 1250-0005 (Recordkeeping and Reporting Requirements Under Rehabilitation Act of 1973, as Amended Section 503). Consequently, this final rule does not require review by OMB under the authority of the Paperwork Reduction Act.

D. Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this final rule would not include any federal mandate that may result in excess of \$100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

E. Executive Order 13132 (Federalism)

OFCCP has reviewed this final rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have “federalism implications.” The final rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This final rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The final rule does not “have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

List of Subjects

41 CFR Part 60-1

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, Reporting and recordkeeping requirements

41 CFR Part 60-2

Equal employment opportunity, Government procurement, Reporting and recordkeeping requirements

41 CFR Part 60-4

Construction industry, Equal employment opportunity, Government procurement, Reporting and recordkeeping requirements

41 CFR Part 60-20

Civil rights, Equal employment opportunity, Government procurement, Labor, Sex discrimination, Women

41 CFR Part 60-30

Administrative practice and procedure, Civil rights, Equal employment opportunity, Government contracts, Government procurement, Government property management, Individuals with Disabilities, Reporting and recordkeeping requirements, Veterans

41 CFR Part 60-40

Freedom of information, Reporting and recordkeeping requirements

41 CFR Part 60-50

Equal employment opportunity, Government procurement, Religious discrimination, Reporting and recordkeeping requirements

41 CFR Parts 60-300 and 60-741

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Labor, Reporting and recordkeeping requirements, Veterans

Michele Hodge,
Acting Director,
Office of Federal Contract Compliance Programs.

For the reasons stated in the preamble, OFCCP revises 41 CFR parts 60-1, 60-2, 60-4, 60-20, 60-30, 60-40, 60-50, 60-300, and 60-741 as follows:

PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

1. The authority citation for part 60-1 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964-1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966-1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

2. Amend § 60-1.3 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.”

3. Revise § 60-1.20(b) to read as follows:

* * * * *

(b) Where deficiencies are found to exist, OFCCP will make reasonable efforts to secure compliance through conciliation and persuasion, pursuant to § 60-1.33. The “reasonable efforts” standard shall be interpreted consistently with title VII of the Civil Rights Act of 1964 and its requirement that the Equal Employment Opportunity Commission endeavor to remove any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval of the commitment, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

* * * * *

§ 60-1.28 [Removed and reserved]

4. Remove and reserve § 60-1.28.

5. Revise § 60-1.33 to read as follows:

§ 60-1.33 Pre-enforcement notice and conciliation procedures.

(a) *Predetermination Notice.* If a compliance evaluation by OFCCP indicates preliminary findings of potential discrimination, OFCCP will issue a Predetermination Notice that describes the preliminary findings and provides the contractor an opportunity to respond. The Predetermination Notice may also include preliminary findings of other potential violations that OFCCP has identified at that stage of the review. After OFCCP issues the Predetermination Notice, the agency may identify additional violations and include them in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Notice of Violation or Show Cause Notice. Any response to a Predetermination Notice must be received by OFCCP within 15 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause. If the contractor does not respond or OFCCP determines that the contractor's response and any additional investigation undertaken by the agency did not resolve the preliminary findings of potential discrimination or other violations identified in the Predetermination Notice, OFCCP will proceed to issue a Notice of Violation.

(b) *Notice of Violation.* If a compliance evaluation by OFCCP indicates a violation of the equal opportunity clause, OFCCP will issue a Notice of Violation to the contractor requiring corrective action. The Notice of Violation will identify the violations found and describe the recommended corrective actions. The Notice of Violation will invite the contractor to conciliate the matter and resolve the findings through a written conciliation agreement. After the Notice of Violation is issued, OFCCP may include additional violations in a subsequent Show Cause Notice without amendment to the Notice of Violation. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Show Cause Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor, or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies identified, including, where appropriate (but not limited to), remedies such as back pay, salary adjustments, and retroactive seniority.

(d) *Show Cause Notice.* When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause the Director may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. OFCCP may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information. The Show Cause Notice will include each violation that OFCCP has identified at the time of issuance. Where OFCCP identifies additional violations after issuing a Show Cause Notice, OFCCP will modify or amend the Show Cause Notice.

(e) *Expedited conciliation option.* OFCCP may agree to waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement with a contractor. OFCCP may offer the contractor this expedited conciliation option but may not require or insist that the contractor avail itself of the expedited conciliation option.

6. Add § 60-1.48 to subpart C to read as follows:

§ 60-1.48 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

7. The authority citation for part 60-2 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501, and E.O. 13672, 79 FR 42971.

8. Add § 60-2.36 to subpart C to read as follows:

§ 60-2.36 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

Part 60-4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS

9. The authority citation for part 60-4 continues to read as follows:

Authority: Secs. 201, 202, 205, 211, 301, 302, and 303 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

10. Add § 60-4.10 to read as follows:

§ 60-4.10 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

PART 60-20—DISCRIMINATION ON THE BASIS OF SEX

11. The authority citation for part 60-20 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964-1965 Comp., p. 339 as amended by E.O. 11375, 32 FR 14303, 3 CFR 1966-1970 Comp., p. 684; E.O. 12086, 43 FR 46501, 3 CFR 1978 Comp., p. 230; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13672, 79 FR 42971.

12. Add § 60-20.9 to read as follows:

§ 60-20.9 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

PART 60-30—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11246

13. The authority citation for part 60-30 continues to read as follows:

Authority: Executive Order 11246, as amended, 30 FR 12319, 32 FR 14303, as amended by E.O. 12086; 29 U.S.C. 793, as amended, and 38 U.S.C. 4212, as amended.

14. Add § 60-30.38 to read as follows:

§ 60-30.38 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

PART 60-40—EXAMINATION AND COPYING OF OFCCP DOCUMENTS

15. The authority citation for part 60-40 continues to read as follows:

Authority: E.O. 11246, as amended by E.O. 11375, and as amended by E.O. 12086; 5 U.S.C. 552.

16. Add § 60-40.9 to read as follows:

§ 60-40.9 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part or chapter.

PART 60-50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN

17. The authority citation for part 60-50 continues to read as follows:

Sec. 201 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

18. Add § 60-50.6 to read as follows:

§ 60-50.6 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

PART 60-300—AFFIRMATIVE ACTION AND NONDISCRIMINATION

OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS

REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS,

ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED

FORCES SERVICE MEDAL VETERANS

19. The authority citation for part 60-300 continues to read as follows:

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

§ 60-300.2 [Amended]

20. Amend § 60-300.2 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.”

21. Revise § 60-300.60(b) to read as follows:

§ 60-300.60 Compliance evaluations.

* * * * *

(b) Where deficiencies are found to exist, OFCCP will make reasonable efforts to secure compliance through conciliation and persuasion, pursuant to § 60-300.62. The “reasonable efforts” standard shall be interpreted consistently with title VII of the Civil Rights Act of 1964 and its requirement that the Equal Employment Opportunity Commission endeavor to remove any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

* * * * *

22. Revise § 60-300.62 to read as follows:

§ 60-300.62 Pre-enforcement notice and conciliation procedures.

(a) *Predetermination Notice.* If a compliance evaluation by OFCCP indicates preliminary findings of potential discrimination, OFCCP will issue a Predetermination Notice that describes the preliminary findings and provides the contractor an opportunity to respond. The Predetermination Notice may also include preliminary findings of other potential violations that OFCCP has identified at that stage of the review. After OFCCP issues the Predetermination Notice, the agency may identify additional violations and include them in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Notice of Violation or Show Cause Notice. Any response to a Predetermination Notice must be received by OFCCP within 15 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause. If the contractor does not respond or OFCCP determines that the contractor's response and any additional investigation undertaken by the agency did not resolve the preliminary findings of potential discrimination or other violations identified in the Predetermination Notice, OFCCP will proceed to issue a Notice of Violation.

(b) *Notice of Violation.* If a compliance evaluation by OFCCP indicates a violation of the equal opportunity clause, OFCCP will issue a Notice of Violation to the contractor requiring corrective action. The Notice of Violation will identify the violations found and describe the recommended corrective actions. The Notice of Violation will invite the contractor to conciliate the matter and resolve the findings through a written conciliation agreement. After the Notice of Violation is issued, OFCCP may include additional violations in a subsequent Show Cause Notice without amendment to the Notice of Violation. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Show Cause Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor, or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies identified, including, where appropriate (but not limited to), remedies such as back pay, salary adjustments, and retroactive seniority.

(d) *Show Cause Notice*. When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause the Director may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. OFCCP may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information. The Show Cause Notice will include each violation that OFCCP has identified at the time of issuance. Where OFCCP identifies additional violations after issuing a Show Cause Notice, OFCCP will modify or amend the Show Cause Notice.

(e) *Expedited conciliation option*. OFCCP may agree to waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement with a contractor. OFCCP may offer the contractor this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

§ 60-300.64 [Removed and Reserved]

23. Remove and reserve § 60-300.64.

24. Add § 60-300.85 to subpart D to read as follows:

§ 60-300.85 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

PART 60-741 – AFFIRMATIVE ACTION AND NONDISCRIMINATION

OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS

REGARDING INDIVIDUALS WITH DISABILITIES

25. The authority citation for part 60-741 continues to read as follows:

Authority: 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

26. Amend § 60-741.2 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.”

27. Revise § 60-741.60(b) to read as follows:

§ 60-741.60 Compliance evaluations.

* * * * *

(b) Where deficiencies are found to exist, OFCCP will make reasonable efforts to secure compliance through conciliation and persuasion, pursuant to § 60-741.62. The “reasonable efforts” standard shall be interpreted consistently with title VII of the Civil Rights Act of 1964 and its requirement that the Equal Employment Opportunity Commission endeavor to remove any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

* * * * *

28. Revise § 60-741.62 to read as follows:

§ 60-741.62 Pre-enforcement notice and conciliation procedures.

(a) *Predetermination Notice.* If a compliance evaluation by OFCCP indicates preliminary findings of potential discrimination, OFCCP will issue a Predetermination Notice that describes the preliminary findings and provides the contractor an opportunity to respond. The Predetermination Notice may also include preliminary findings of other potential violations that OFCCP has identified at that stage of the review. After OFCCP issues the Predetermination

Notice, the agency may identify additional violations and include them in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Notice of Violation or Show Cause Notice. Any response to a Predetermination Notice must be received by OFCCP within 15 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause. If the contractor does not respond or OFCCP determines that the contractor's response and any additional investigation undertaken by the agency did not resolve the preliminary findings of potential discrimination or other violations identified in the Predetermination Notice, OFCCP will proceed to issue a Notice of Violation.

(b) *Notice of Violation.* If a compliance evaluation by OFCCP indicates a violation of the equal opportunity clause, OFCCP will issue a Notice of Violation to the contractor requiring corrective action. The Notice of Violation will identify the violations found and describe the recommended corrective actions. The Notice of Violation will invite the contractor to conciliate the matter and resolve the findings through a written conciliation agreement. After the Notice of Violation is issued, OFCCP may include additional violations in a subsequent Show Cause Notice without amendment to the Notice of Violation. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Show Cause Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor, or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct

the violations and/or deficiencies identified, including, where appropriate (but not limited to), remedies such as back pay, salary adjustments, and retroactive seniority.

(d) *Remedial benchmarks.* The remedial action referenced in paragraph (c) of this section may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

(e) *Show Cause Notice.* When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause the Director may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. OFCCP may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information. The Show Cause Notice will include each violation that OFCCP has identified at the time of issuance. Where OFCCP identifies additional violations after issuing a Show Cause Notice, OFCCP will modify or amend the Show Cause Notice.

(f) *Expedited conciliation option.* OFCCP may agree to waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement with a contractor. OFCCP may offer the contractor this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

§ 60-741.64 [Removed and Reserved]

29. Remove and reserve § 60-741.64.

30. Add § 60-741.84 to read as follows:

§ 60-741.84 Severability.

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

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